Petition

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IN THE

Supreme Court of the United States

APRIL TERM, 1982

NO. _____

EGON OPPENHEIM, ET AL,
Petitioners

v.

JACQUES MOREAU, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether aliens who make misrepresentations in order to obtain their visas and/or who have violated the terms and provisions of their visas, may not legally enter into contracts in this country and may not therefore recover for tortious interference with prospective contracts.

2. Whether any courts may enjoin a citizen from reporting violations of law to the sovereign and/or giving evidence in proceedings relating to the violations of law.

3. Whether the Court of Appeals erred in failing to hold that the trial court erred in failing to hold and instruct the jury that, under Texas law, only a shareholder may complain of the removal of a director and/or an officer of a corporation, which action was violative of the provisions of Rule 51, Federal Rules of Civil Procedure.

4. Whether a party is entitled to specific instructions on the theory of his case if there is evidence to support it.

5. Whether a court may charge the jury in a manner that does violence to applicable state law and when the issue has been waived by counsel for the party for whose benefit the charge is given.

6. Whether the plaintiff in the first suit filed, in a consolidated case, is entitled to open and close first.

7. Whether the trial court erred in failing to hold, that as a matter of law, Petitioners were entitled to recover damages from Respondents.

8. Whether a trial court may assess attorneys' fees as costs without having the question of the reasonable amount of same tried and determined by the jury, when a general demand for jury trial has been made.

9. Whether no conversion would lie for the detention of the horses since there was a valid claim for reimbursement of stabling expenses and there was a legitimate conflict as to the right of ownership in the horses which was evidenced by the filing of the suit to determine same.

10. Whether damages may be recovered for tortious interference with the horses, the subject of the suit, for the period during which the horses were subject to an agreed injunction, in federal court, which prohibited their sale or transfer.

11. Whether damages may be taxed as costs and/or awarded by the court in a manner inconsistent with the relief sought by the prevailing party's pleadings.

LIST OF PARTIES

Petitioners:

Egon S. Oppenheim,

Nelly Oppenheim,

Alduro-Raynes Arabians, Inc.,
A Texas Corporation.

Respondents:

Jacques Moreau,

Ermine Moreau-Sipiere,

Eric Moreau-Sipiere,

Xavier Moreau-Sipiere,

Virginia H. Zimmerman.

SUBJECT INDEX

	Page
QUESTIONS PRESENTED FOR REVIEW	1
LIST OF PARTIES	III
OPINION BELOW	2
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED	2
STATEMENT OF FACTS	3
JURISDICTION	5
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	24
APPENDIX A—Fifth Circuit Court's Opinion	A-1
APPENDIX B—Fifth Circuit Court's Denial of Motion for Rehearing	B-1
APPENDIX C—District Court's Judgment	C-1
APPENDIX D—Court's Charge to the Jury	D-1
APPENDIX E—District Court's Injunction	E-1
APPENDIX F—Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Involved	F-1
APPENDIX G—Notice of Appeal to the Supreme Court of the United States	G-1
APPENDIX H—First Amended Notice of Appeal to the Supreme Court of the United States	H-1

TABLE OF CASES

CASES	Page
Burroughs v. Garrett, 352 P.2d 644 (Sup. Ct. New Mexico, 1960)	22
Camp v. Shannon, 162 Tex. 515, 348 S.W.2d 517	15
Chicago & N.W. Ry. Co. v. Green, 164 F.2d 55 (C.A. 8—1947)	16
City of Orangeburg v. Southern Ry. Co., 134 F.2d 890 (C.A. 4, 1943)	23

CASES

	Page
Continental Wallpaper Company v. Louis Voight and Sons Company, 212 U.S. 227, 29 S.Ct. 280 (1908)	6
Davis v. Naviera Aznar S.A., 37 F.R.D. 223 (D. Maryland, 1965)	21
Ewert v. Bluejacket, 259 U.S. 129, 42 S.Ct. 442 (1922)	6
Gaines v. Racenet, 11 F.R.D. 109 (D.C. N.Y.)	19, 20
Gold Metal Product, Inc. v. Interstate Computer Services, Inc., 436 N.Y.S.2d. 312 (Supreme Court N.Y., 1981)	22
Home Ins. Co., New York v. Consolidated Bus Lines, 179 F.2d 768 (C.A. 4—1950)	16
Lockwood Corporation v. Black, 501 F.Supp. 261 (N.D. Texas, 1980)	17
Mangum v. Swearingen, 565 S.W.2d 957 (Tex. Civ. App.—San Antonio 1978, writ ref'd, n.r.e.)	15
Marshall v. Gibson's Products, Inc. of Plano, 584 F.2d 668 (C.A. 5, 1978)	13
McMullen v. Hoffman, 174 U.S. 639; 19 S.Ct. 839 (1899)	7
Meachum v. Halley, 103 F.2d 967 (C.A. 5—1939)	17
Mohomed v. Vician, 490 F.Supp. 954 (D.C., S.D. New York—1980)	10
Montgomery v. Virginia State Lines, 191 F.2d 770 (C.A. D.C.—1951)	16
Pulchny v. Pulchny, 555 S.W.2d 543 (Tex. Civ. App.—Corpus Christi, 1977, no writ)	20
Safety Casualty Co. v. McGee, 133 Tex. 233, 127 S.W.2d 176 (1939)	17
Stone v. Lawyers Title Insurance Corporation, 554 S.W.2d 183 (Tex. Sup.—1977)	20
Texas Employers' Ins. Ass'n v. Tabor, 283 S.W. 779, (Comm. App. 1926—opinion adopted)	7
Texlite, Inc. v. Wineburgh, 373 S.W.2d 325 (Tex. Civ. App. —Dallas 1963, writ ref'd n.r.e.)	15
Thompson v. Ferguson & Turnley, 250 S.W. 204 (Tex. Civ. App.—Amarillo 1923, no writ)	18
Tomkins v. Seattle Construction and Drydock Co., 165 P. 384 (Sup. Ct. Wash., 1917)	7
Turner Construction Co. v. Houlihan, 240 F.2d 435 (C.A. 1, 1957)	16
United States v. Pizzarusso, 388 F.2d 8 (C.A. 2, 1968—cert. den. 392 U.S. 936, 88 S.Ct. 2306, 20 L.Ed.2d 1395)	12
United Transp. Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971)	24
Van Scherpe v. Ulberg, 206 N.W. 323, 232 Mich. 699	18
Wantland v. Illinois Central RR. Co., 237 F.2d 921 (C.A. 7—1956)	19
Waysker v. Hammer, 223 U.S. 85, 32 S.Ct. 187 (1911)	6
Webb v. O'Brien, 263 U.S. 313, 44 S.Ct. 112 (1923)	7

Page

CONSTITUTIONS

Amendment V, Constitution of the United States 2
Amendment XIV, § 1, Constitution of the United States .. 2
Article 12, § 6, Constitution of the State of Texas 2

STATUTES

Article 2.25, Texas Business Corporation Act 2, 15
Article 2.27, Texas Business Corporation Act 2, 15
Article 5502, Vernon's Texas Civil Statutes 2, 21
Rule 8(c), Fed. R. Civ. P. 2
Rule 12(e), Fed. R. Civ. P. 2
Rule 19, Fed. R. Civ. P. 2
Rule 51, Fed. R. Civ. P. 1, 2, 15, 17, 22
Title 8 U.S.C.A. Section 1101(a)(15)(L) 2, 8
Title 8 U.S.C.A. Section 1182(a)(14) 2
Title 8 U.S.C.A. Section 1184(a) 2, 9
Title 8 U.S.C.A. Section 1325 ..... 2, 8
Title 18 U.S.C.A. Section 371 ..... 2, 9
Title 18 U.S.C.A. Section 1546 ..... 2, 8
Title 28 U.S.C.A. Section 1254(1) 2, 5, 6
Title 28 U.S.C.A. Section 1332(a)(2) 2, 6
Title 28 U.S.C.A. Section 1746 ..... 2, 9
Title 42 U.S.C.A. Section 1981 ..... 2, 14

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Egon S. Oppenheim, Nelly Oppenheim, and Alduro-Raynes Arabians, Inc., a Texas corporation, by and through their attorney of record, respectfully request that a Writ of Certiorari issue to review the Judgment of the Court of Appeals of the Fifth Circuit entered December 2, 1981, and the Order of said Court, dated January 25, 1982, denying rehearing, which affirmed the decision of the United States District Court for the Southern District of Texas, George Cire, and remanded for determination of additional costs due Intervenor, Zimmerman.

The Respondents to this Petition will be Jacques Moreau, Ermine Moreau-Sipiere, Eric Moreau-Sipiere, Xavier Moreau-Sipiere and Virginia H. Zimmerman.

OPINION BELOW

The Fifth Circuit Court of Appeals, by its judgment appearing in appendix A, affirmed the decision of the United States District Court for the Southern District of Texas, George Cire, awarding damages against Petitioners. The Circuit Court denied Petitioners' Motion for Rehearing on January 25, 1982, by its judgment appearing in appendix B. A copy of the District Court Judgment is attached hereto at appendix C and a copy of the charge to the jury is attached hereto at appendix D, and there is no published opinion or judgment of the trial court. The Injunction entered after judgment is attached hereto at appendix E.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case involves Rules 8(c), 12(e), 19 and 51, Federal Rules of Civil Procedure; Title 8 U.S.C.A. Sections 1101(a)(15)(L), 1182(a)(14), 1184(a) and 1325; Title 18 U.S.C.A. Sections 371 and 1546; Title 28 U.S.C.A. Sections 1254(1), 1332(a)(2) and 1746; Title 42 U.S.C.A. Section 1981; Articles 2.25 and 2.27 Texas Business Corporation Act; Article 5502, Vernon's Texas Civil Statutes; Article 12, § 6, the Constitution of the State of Texas; and Amendments V and XIV § 1 of the Constitution of the United States. The pertinent provisions of these statutes are set forth in appendix F.

STATEMENT OF FACTS

Commencing in February of 1979, the Oppenheims and the Moreaus began serious discussions relating to the relocation to the United States from France of the Moreaus, who are French citizens, together with their horses. These discussions culminated in an agreement being reached whereby a Texas corporation was to be formed, to which corporation the Oppenheims and the Moreaus would each contribute $30,000.00 in return for five hundred shares of Class A stock, and to which corporation both parties would each sell an equal value of stock in return for Class B Stock. The Moreaus were to be employed by the corporation and the corporation was to lease the Oppenheims' farm. In June of 1979, the Moreaus came to Houston, Texas, and together with the Oppenheims held the organizational meeting of the corporation, wherein the Oppenheims and the Moreaus were respectively elected both as officers and as directors of the corporation. Immediately after this meeting, a bank account was opened for the corporation and a deposit was made in said account by the Oppenheims. The Moreaus then saw a Houston attorney, Sam Williamson, who agreed to assist them in obtaining L-1 and L-2 visas to come to the United States. Application was made by the Moreaus to obtain their L-1 and L-2 visas; and, in their applications, the Moreaus represented, under oath, that they controlled the corporation, by stock ownership and/or voting proxies.

The visas which had been requested were issued in July of 1979. Although Xavier Moreau came to this country in September of 1979, the Moreaus did nothing else about fulfilling their commitments under the agreement entered into with the Oppenheims, even though re-

peated demands were made upon them to do so. On or about October 18, 1979, the Oppenheims, as sole shareholders in Alduro-Raynes Arabians, Inc., called a special meeting of shareholders and directors and removed the Moreaus as directors and officers of the corporation.

The horses arrived at the farm owned by the Oppenheims at Montgomery, Montgomery County, Texas, on or about November 3, 1979. The horses remained at the farm, without any problem and without any indication that they had not been imported pursuant to the agreement between the Oppenheims and the Moreaus until Ermine Moreau arrived on November 22, 1979. A meeting was had on November 23, 1979, at the farm, and it was at this meeting that for the first time the Moreaus definitely said that they were not going to abide by the agreement which they had entered into with the Oppenheims. The Moreaus threatened to remove the horses from the farm and the Oppenheims refused to allow the removal of the horses at that time. Alduro filed suit in the District Court of Montgomery County, Texas, seeking to recover its damages, enforce specific performance of the agreement and prohibit removal of the horses from its custody on November 26, 1979.

After November 26, 1979, the Moreaus filed their suit in the United States District Court against the Oppenheims; and, after filing of their suit, they filed their removal petition to remove to federal court the earlier state action against them.

On or about December 7, 1979, an agreed injunction was entered, prohibiting any party from selling, transferring or in any way attempting to change the ownership

status of the horses pending further order of the United States District Court. This order was not modified until on or about April 3, 1980, at which time a new order was entered by the Honorable George Cire.

In about March of 1980, the Oppenheims, as they were required to do by the visas of the Moreaus, reported the Moreaus to the Immigration and Naturalization Service of the Department of Justice, as being out of status and in violation of their L-1 and L-2 visas. As a result of this report, a deportation hearing was had and an order was entered requiring the Moreaus to be deported from this country.

In about September of 1980, Virginia H. Zimmerman filed her Petition in Intervention to recover the costs of stabling certain of the horses which had been stabled at her farm by the Moreaus pursuant to the Order of December 7, 1979.

The case came to trial on February 17, 1981, before the Honorable George Cire, presiding. Judgment was entered on March 23, 1981 and subsequent thereto, the Moreaus sought injunctive relief against Petitioners. As a result of said application, the Trial Court, ex parte, granted its injunction of July 17, 1981, prohibiting Petitioners from taking any action relating to the immigration status of the Moreaus.

JURISDICTION

The Judgment of the Fifth Circuit affirmed the Decision of the United States District Court for the Southern District of Texas, George Cire, was dated December 2, 1981. This Court's jurisdiction is invoked under 28 U.S.C.A. Section 1254(1). The Notice of Appeal and

First Amended Notice of Appeal, both filed with the Fifth Circuit, are at Appendix G and H, respectively.

The District Court had jurisdiction of the original case pursuant to the provisions of Title 28 U.S.C.A. Section 1332(a)(2).

REASONS FOR GRANTING THE WRIT

1. This case involves, in great part, a unique question of law and affords this Honorable Court an opportunity to differentiate and resolve apparently conflicting statements of Congressional intent and of public policy. Specifically, this case involves the question of what rights, if any, do *illegal aliens* have to contract in this Country if to so contract violates the penal laws of this country and further violates what this Honorable Court has time and again found to be Public Policy regarding contracts made in violation of law.

This Honorable Court has, time and again, stated the correct rule of law that "an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer." *Waysker v. Hammer,* 223 U.S. 85, 32 S.Ct. 187 (1911); *Ewert v. Bluejacket,* 259 U.S. 129, 42 S.Ct. 442 (1922). This Honorable Court has also stated that "a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality . . ." *Continental Wallpaper Company v. Louis Voight and Sons Company,* 212 U.S. 227, 262, 29 S.Ct. 280 (1908). Furthermore, this Honorable Court has also stated that "[T]he authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In

case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract." *McMullen v. Hoffman,* 174 U.S. 639, 654; 19 S.Ct. 839 (1899). The law in Texas is in accord and could not be clearer but that "[A] contract to do a thing which cannot be performed without a violation of the law is void. . . ." *Texas Employers' Ins. Ass'n v. Tabor,* 283 S.W. 779, 780 (Comm. App. 1926—opinion adopted).

Additionally, the Supreme Court has previously upheld the proposition that it is not a denial of Due Process to deny an alien ineligible to citizenship the right to contract unless the alien is permitted to contract by law; and, in the same case, the Supreme Court held that a citizen has no legal right to enter into a contract with an alien not eligible for citizenship under the laws of the United States unless the alien is permitted by law to make and carry out such a contract. *Webb v. O'Brien,* 263 U.S. 313, 44 S.Ct. 112 (1923).

Furthermore, in a case squarely on point with the case at bar, the Supreme Court of Washington denied recovery to an illegal alien for damages for breach of contract. In *Tomkins v. Seattle Construction and Drydock Co.,* 165 P. 384 (Sup. Ct. Wash., 1917), the Court denied an illegal alien the right to recover damages for labor which he could have performed illegally while remaining in the United States in contravention of the immigration laws. As such, *Tomkins* represents authority specifically on point with the issue at bar concerning Respondents' recovery for tortious interference with prospective business relations and/or contracts.

The Court of Appeals' opinion does violence to these Rules. Contrary to the Fifth Circuit's opinion, Petitioners' argument was that the contracts with which Petitioners allegedly tortiously interferred were illegal and void and therefore could not be interferred with, as a matter of law. Furthermore, nowhere in the Trial Court proceedings was it presented that the contracts in question were breached nor was it shown that the Trial Court was faced with a case of "illegal entry, standing alone." Quite the contrary, Petitioners established the Respondents' misrepresentations under oath to American Consular officials in Paris, illegal obtainment of visas, use of the illegal visas in this country and violation of their status, if any, once they were in this country. Furthermore, the Fifth Circuit blatantly overlooks the fact that the Moreaus entered on L1 and L2 visas, which according to Title 8 U.S.C.A. § 1101(a)(15)(L), clearly requires an alien to have been employed continuously for one year by the firm and the alien must be seeking to enter the United States temporarily in order to continue to render his services to the same employer. The effect and the purport of the visas was brought forth in the testimony of Sam Williamson. The testimony of Mrs. Moreau is clear that they were not employees and never had an intention of being employees, and therefore their presence was violative of the visas and the violation of the visas had nothing to do with the actions of the Oppenheims.

Title 8 U.S.C.A. Section 1325, makes the false representations a misdemeanor offense for the first commission thereof, and a felony offense for subsequent commissions thereof. Furthermore, Title 18 U.S.C.A. Section 1546 makes it a felony offense to knowingly use, attempt to use,

possess, obtain, accept or receive any visa, knowing said visa to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud. Said section further makes it an offense to knowingly make under oath, or as permitted under penalty of perjury under Section 1746 of Title 28, U.S.C.A., to knowingly subscribe as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or to knowingly present any such application, affidavit, or other document containing any such false statement.

The testimony of the Moreaus is uncontroverted that they discussed amongst themselves the actions to be taken in gaining admittance to this country, and that Mrs. Moreau acted on their collective behalf in filing the documentation with the American Consul. Petitioners urge that this action on the part of the Moreaus in misrepresenting material facts to the American Government in order to secure the visas in the manner in which they did, amounts to and is a conspiracy to defraud the United States. Title 18 U.S.C.A. Section 371 makes these actions on the part of the Moreaus a felony offense, and Petitioners would urge that any contracts which the Moreaus would enter into, would be but the fruits of the conspiracy and therefore illegal also. Alternatively, any contracts thus entered into would be in the furtherance of an illegal conspiracy to defraud the United States Government and/or to violate the Immigration Laws of the United States and would be illegal.

Title 8 U.S.C.A., Section 1184(a), prescribes that "the admission to the United States of any alien as a nonimmigrant shall be for such time and under such condi-

tions as the Attorney General may by regulations prescribe . . . *to insure* that at the expiration of such time or upon failure to maintain the status under which he was admitted . . . such alien *will* depart from the United States." [Emphasis supplied] Under this statute, the refusal to work for the corporation effected a failure to maintain the status under which the Moreaus were admitted to this country and required them to depart this country. Indeed, it has been held that the Immigration and Naturalization Service considers any unauthorized stay, however short, to constitute a substantial violation of the conditions of a maintenance of status. *Mohomed v. Vician,* 490 F.Supp. 954 (D.C. S.D. New York—1980). Being required to depart this country, how then can they argue that they had a right to remain in this country and enter into prospective contracts?

In the alternative, but without waiving any of the foregoing, public policy demands that an illegal alien not benefit, unconscionably, from his violation of his immigration status, by recovering, as damages, what he could have earned by entering into and performing, illegal contracts and employment in violation of the regulations and laws of the United States. In the case below, Respondents, the Moreaus, were allowed to submit the issue of tortious interference with prospective business relations to the jury over the strenuous objections of Petitioner's counsels. There is a presumption, which is elementary law, that parties to a prospective transaction will obey the law and will not violate it in their business relations. Thus, the presumption, if any, with respect to the Moreaus' prospective business relations and/or employment while they were illegal aliens was that they would take no employment unless and until they were again in compliance

with their visas and immigration status under the laws and regulations pertaining thereto of the United States.

The submission of the issue to the jury, on the tortious interference with prospective business relations issue, was clear legal error and contrary to the above-cited line of cases decided by this Honorable Court. Furthermore, such a submission was in clear violation of the intent of Congress in establishing the regulatory scheme pertaining to our laws of immigration and was inimical and contrary to public policy. Having failed to take any steps to comply with the laws of the United States, Moreaus are in no position to argue that Petitioners reported their violation of the immigration laws to the Federal Sovereign. Moreaus by their slothful inaction, brought about their own deportation. The fact that deportation proceedings were initiated against them by the Government of the United States, acting through its Department of Justice, is no cause for judicial sympathy to the Moreaus supposed plight as was evidenced by the Trial Court below. An inference was raised to the jury, by both the conduct of the judge below, and the Moreaus and their counsel, that the deportation proceeding itself constituted a tortious interference with prospective business relations of the Respondents for which Petitioners should respond in damages.

The improper use of deportation proceedings to evoke sympathy in the jury, and the cooperation of the District Judge in the scheme, was perhaps the lynch pin of Respondents' successful trial presentation under the tortious interference theory. Unless this Court reverses this verdict, this decision will serve as a shining beacon to the teeming swarms of illegal immigrants who would enter this

Country, violate our laws, and then utilize our courts and legal processes to punish those citizens foolhardy enough to extend their cooperation and support to the Executive arm of our Government combating such abuses. Such result is so unthinkable that it would constitute a judicial and legal aberration.

It is respectfully submitted that this Honorable Court has an opportunity to delineate the rights of an illegal alien so as to work substantial justice while preserving the intent of Congress and Federal Law in this area. This Court should not waste this chance to limit the recovery of an illegal alien, in cases of this type, to the value of the labor already performed. To do less would discourage the Moreaus, and others of their ilk, from complying with the terms of the special visas under which they gained preferential entry into this Country.

Indeed, to do less, would also lay waste to the line of cases giving extra-territorial effect to the Immigration Laws of this Country. The Fifth Circuit failed to deal with the fact that in making the representations to the American Embassy in Paris in order to obtain their visas, if in their opinion there was no corporation, and they did not control it, and they were not going to work for it, the Moreaus had already committed the crime, and it is no defense to this illegality that the Moreaus have not been indicted therefor. *United States v. Pizzarusso*, 388 F.2d 8 (C.A. 2, 1968—cert. den. 392 U.S. 936, 88 S.Ct. 2306, 20 L.Ed.2d 1395). How more succinctly can it be put than it is in *Pizzarusso* where the Second Circuit stated: "[T]he utterance by an alien of a "false statement with respect to a material fact" in a visa application constitutes an *affront to the very sovereignty*

of the United States. These false statements must be said to have a deleterious influence on valid governmental interests." (supra, pp. 9, 10) [Emphasis supplied]

2. Another unique question of law presented by this case is whether or not a United States District Court, may, by its injunction, deny a citizen access to the courts of this land and whether that court may prohibit, by its injunction, the giving of evidence in criminal proceedings, as was done by the Injunction of June 17, 1981. (Appendix E)

The Moreaus' request for injunctive relief was granted, ex parte, and without the taking of any additional evidence by the Trial Court. The effect of the order entered is to deprive the Oppenheims, as citizens, of access to the Courts of this land, specifically to any courts in which anything relating to the possible deportation of the Moreaus might be heard, and to deny the Oppenheims the right to report violations of the laws and regulations of this Country. Further, the denial of a plenary hearing at which evidence could be produced is a violation of the Oppenheims' rights, for as the Fifth Circuit itself has said, under the traditional principles of equity jurisprudence, which apply in the absence of express congressional indication to the contrary, an injunction will not ordinarily issue without notice or hearing. *Marshall v. Gibson's Products, Inc. of Plano,* 584 F.2d 668 (C.A.5, 1978).

More importantly, the effect of the injunction granted on June 17, 1981, was to prohibit Petitioners from bringing to the attention of the Federal Sovereign the continued violation of their immigration status by the Moreaus and the Moreaus' continued violation of the laws of this country. What the District Court did, in effect, was to

prohibit the Petitioners from reporting a crime and from giving evidence thereon to the Sovereign. This prohibition from the District Court denied Petitioners the right to give evidence, which right is guaranteed to the Petitioners by Title 42 U.S.C.A. § 1981, and by the Fourteenth Amendment to the United States Constitution. Further, the action of the District Court opens the door to courts being used to prevent the reporting of crimes of all sorts, when the witness thereto is subjected to punishment for violating injunctions. This Honorable Court cannot allow this aberration to stand uncorrected.

3. Petitioners' counsel specifically objected to the instructions and charge to the Jury with respect to breach of fiduciary duty, which objections were overruled by the Trial Court; and, even though Petitioners' counsel requested an instruction on the law in Texas with respect to who has standing to complain of the removal of officers and directors from a corporation, this requested instruction was refused. The Trial Court gave the Jury a charge with respect to the breach of fiduciary duty on the part of Petitioners which was limited specifically to the holding of a shareholders and a directors meeting of the corporation in October of 1979 and removing the Moreaus as directors and officers.

The clear, uncontroverted evidence in this case hereinbelow is that the Moreaus never paid any money or other consideration to Alduro-Raynes Arabians, Inc. in return for stock therein, and that the By-laws of the corporation allow shareholders to remove directors, with or without cause, with or without notice to the directors, and at regular or special meetings of the shareholders as well as allow directors of the corporation to remove officers,

with or without cause, with or without notice to the officers and at regular or special meetings of the directors.

The Trial Court hereunder is located in Texas and it applied Texas Law to the facts of the case. The law in Texas is clear. The power to remove a corporate officer is one necessarily incident to every corporation. *Mangum v. Swearingen,* 565 S.W.2d 957 (Tex. Civ. App.—San Antonio 1978, writ ref'd, n.r.e.). The law in Texas is also clear that "[T]he provision in the by-laws limiting the right to vote to those "who appear as stockholders upon the records of the company," and the statutory provisions for notice of meetings and for the preparation of a voting list prior to meetings (Arts. 2.25 and 2.27, Business Corporation Act, V.A.T.S.) are all for the benefit of the corporation. *They do not afford to one not a shareholder a right to complain of lack of notice of a meeting, or of the absence of a quorum or of action taken by the Shareholders not within the purview of the call of the meeting." Texlite, Inc. v. Wineburgh,* 373 S.W.2d 325, 328 (Tex. Civ. App.—Dallas 1963, writ ref'd, n.r.e.) citing *Camp v. Shannon,* 162 Tex. 515, 348 S.W.2d 517 [Emphasis supplied]. That same case also stands for the proposition that a removed director cannot be heard to complain if he is removed by the majority of stockholders without cause when it appears that he is neither a stockholder nor creditor of the corporation. (Ibid).

There being no cause of action which is maintainable in this situation, under Texas Law, the action of the Trial Court in overruling Petitioners' objections to the instructions and in failing to instruct the Jury on the above-cited Texas Law violated the provisions of Rule 51, Fed. R. Civ. P. and requires reversal.

4. Furthermore, Petitioners objected to the failure of the Trial Court to include an instruction on the general principles of contract law and requested that the Trial Court instruct the Jury on the principles of contract law, which objection and request were both overruled. The Court failed to instruct the jury as to the evidentiary presumptions of law pertaining to contractual relationships in the State of Texas. The Trial Court committed prejudicial error by generally charging the jury on the issues of fraud, conversion and breach of fiduciary duty, without including a general instruction pertaining to the contractual issues in the cause. This legal dereliction by the Trial Court unfairly focused the attention of the jury on the theories of recovery of the Respondents, the Moreaus. Even in the absence of a specific request for an instruction, a Federal Court must nevertheless charge the jury on the broad fundamental rules of law applicable to the principal issues of fact in the case. This principle of law, imposing the duty to charge the jury is restated in *Turner Construction Co. v. Houlihan,* 240 F.2d 435 (C.A. 1, 1957). By not holding that the Trial Court erred, the Fifth Circuit is reaching a decision which is opposite of that reached in other circuits.

Indeed, the Fifth Circuit has rendered an opinion which conflicts with a line of decisions out of other circuits which hold to the effect that as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made. *Montgomery v. Virginia State Lines,* 191 F.2d 770 (C.A. D.C.—1951; *Chicago & N.W. Ry. Co. v. Green,* 164 F.2d 55 (C.A. 8—1947); *Home Ins. Co., New York v. Consolidated Bus Lines,* 179 F.2d 768 (C.A. 4—1950).

5. In its charge to the jury, the Trial Court set forth two representations, on page 7 of the Charge to the Jury, which the Moreaus contended constituted fraud. The agreement which was entered into by the Moreaus and the Oppenheims called for the agreement to be governed by the laws of the State of Texas. Even absent such an agreement, Texas law is clear that the place of making a contract is the place where the last fact necessary to complete the contract is done, namely where the offer is accepted; and that the law of place where the contract is made determines the validity, interpretation and effect of contracts in general. *Lockwood Corporation v. Black,* 501 F.Supp. 261 (N.D. Texas, 1980). Under Texas law, misrepresentations as to matters of law will not constitute remediable fraud. *Safety Casualty Co. v. McGee,* 133 Tex. 233, 127 S.W.2d 176 (1939). Some authorities state that the reason for the rule is that every one is presumed, or bound, to know the law and, therefore, cannot, in legal contemplation, be deceived by erroneous statements of law. *Meacham v. Halley,* 103 F.2d 967 (C.A. 5—1939); *Safety Casualty Co. (supra).* Since the powers and duties of the president of a Texas corporation are a matter governed by statute there could also be no remediable misrepresentation as to the powers of the corporate president. For these reasons, under the charge given to the jury, the finding of fraud was error, as a matter of law, and must be reversed as being violative of the requirements of Rule 51, Fed. R. Civ. P.

Furthermore, the Charge to the Jury indicates that the Moreaus contend that the Oppenheims misrepresented that the provision calling for the sale of the Moreaus' horses to the corporation would not be enforced and that this constituted fraud. The evidence shows that the

Moreaus knew prior to the horses being sent to this country that the Oppenheims were insisting upon the sale of the Moreaus' horses to the corporation. Knowing this prior to the sending of the horses to this country, on what was until then a wholly executory contract as to the Moreaus, the Moreaus should have been held to have been precluded to assert a cause of action for fraud. The law in Texas is clear that acts on the part of the defrauded party in performance or affirmance of the transaction or contract, after a discovery of the fraud and while the contract remains entirely executory on his part, will preclude him from asserting a cause of action for fraud. *Thompson v. Ferguson & Turnley*, 250 S.W. 204 (Tex. Civ. App.—Amarillo 1923, no writ). Under such circumstances, a recovery would be largely, if not entirely, for self-inflicted injuries and the maxim, *Volenti non fit injuria,* has been held to apply by the highest Court of another state. *Van Scherpe v. Ulberg,* 206 N.W. 323, 232 Mich. 699.

Petitioners would also argue that the Moreaus waived any claim of misrepresentation of law and that any judgment predicated thereon is clearly erroneous and must be reversed. Specifically, in the Statement of Facts, Vol. V, beginning at page 224, line 14, the Court requested of the Moreaus what misrepresentations of law they were claiming, to which the Moreaus' counsel responded: "I don't know of any". Furthermore, the Court specifically found beginning at line 24, that "the only misrepresentation that they are claiming is that they were told that it was in the contract for the purpose of assisting in the importation of the horses and in—and in their immigration, I guess." Any finding therefore, by the Fifth Circuit, that the judgment and the damages awarded thereunder can

be predicated upon misrepresentations of law must fail upon its face as having been waived hereinbelow. Since the Trial Court instructed the jury that it must find both the misrepresentation as to law as well as the intent with respect to the contract, in order to find fraud, the instruction submitted to the jury was erroneous, violative of the provisions of Rule 51, Fed. R. Civ. P., and requires reversal. In a case similar to the one at bar, a jury was instructed to consider and assess damages for an element or elements which had been waived, perhaps inadvertently, by the plaintiff, which action on the part of the trial court was held to be prejudicial error. *Wantland v. Illinois Central RR. Co.*, 237 F.2d 921 (C.A.7 1956).

6. In the procedural history of this case, Alduro-Raynes Arabians, Inc., filed the initial suit against the Moreaus in the State District Court of Montgomery County, Texas. The Respondents removed that action to the United States District Court after they had filed suit against the Oppenheims, naming the Oppenheims as Defendants, but not suing the corporation. The Moreaus then consolidated the removed suit of Alduro with their own subsequent action. Although Alduro-Raynes Arabians, Inc., was the initial Plaintiff in the first suit filed in the State Court, the Trial Court, over the objection of Alduro's counsel, gave the Moreaus the right to open and close the evidence and the arguments. It has long been held that where actions involving the same transaction are consolidated, the Plaintiff in one of the actions being the Defendant in the other, the right to open and close may be accorded to the Plaintiff whose action was first commenced. "The moving parties on such consolidation should not be given a technical advantage in opening and closing." *Gaines v. Racenet*, 11 F.R.D. 109 (D.C.

N.Y.). In a close case, such as the one below, the right to open and close is crucial to trial counsel.

7. In the case below, the evidence is uncontroverted that Petitioners relied, to their detriment, upon the representations and actions of the Moreaus, and that the Moreaus did not feel that they had any agreement when they came to the United States, that everything was still to be worked out, their representations to the United States Government notwithstanding. The law in Texas is clear that a promise to do an act in the future may form the basis for an action in fraud when it is made with the intention, design and purpose of deceiving and with no intention of performing it. *Pulchny v. Pulchny*, 555 S.W.2d 543, (Tex. Civ. App.—Corpus Christi, 1977 no writ). Actionable fraud in Texas requires that a material representation was made, that it was false, that when it was made speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion, that the speaker made it with the intention that should be acted upon, and that the party acted in reliance upon it and thereby suffered injury. *Stone v. Lawyers Title Insurance Corporation*, 554 S.W. 2d 183, (Tex. Sup. 1977). Petitioners were induced into believing that they had an agreement with the Respondents by the representations and actions of the Respondents, the Moreaus, and thereby suffered detriment and damages. Having met their burden of proof, the Petitioners were entitled as a matter of law to recover their damages from the Moreaus.

8. This case was tried to a jury hereinbelow, a general demand for jury trial having been made by the Oppenheims and by Alduro-Raynes Arabians, Inc. The issue

of the attorneys' fees for the Intervenor, Virginia H. Zimmerman, was not submitted to the jury for determination, and indeed, the fees were added by the Court after the verdict of the jury. The law is clear that a demand for jury trial having been made, evidence of counsel fees must be submitted to the jury, under proper instructions, for determination of the jury in arriving at total damages to be assessed, and failing that, the Court can not, after verdict, reopen and add damages that the Intervenor in this case recovers. *Davis v. Naviera Aznar S.A.*, 37 F.R.D. 223 (D. Maryland, 1965). The awarding of attorneys' fees hereunder by the District Court without submitting said issue to the jury is clear error and requires reversal of such portion of the judgment.

9. Petitioners were denied recovery for the livery expenses which they advanced. The evidence is undisputed that the horses which are the subject of this suit were placed in the possession of the Oppenheims and kept at the Oppenheims' farm in Montgomery County, Texas, for over three weeks before the complete breach of the agreement by the Moreaus. It is also undisputed that the Moreaus stabled the horses on the Oppenheims' farm, permissively, pursuant to their own admitted reliance on the agreement either already negotiated or to be negotiated between the parties. The horses in question had been stabled by the Oppenheims, and, under the Texas Statute, Article 5502, V.T.C.S., the Oppenheims as stablers of the horses had a stableman's and livery lien against the horses to secure payment of the stabling and boarding costs. This lien would have been lost had the horses been released from the custody of the Oppenheims absent a Court Order. As such, since this was a valid exercise of a Statutory right, there can be no conversion of the horses

which were *peacefully* placed in the possession of the Oppenheims by the Moreaus. Damages for any conversion could have resulted, on this record, only after demand had been made for the return of the horses by the Moreaus and the Petitioners had withheld the horses under no substantial claim of right.

Furthermore, at the first available opportunity, Alduro-Raynes Arabians, Inc., filed suit in a Court of competent jurisdiction to determine the ownership of the horses, and secured a temporary restraining order as to their removal from the Oppenheims' farm. There being a legitimate claim to the question of ownership and the right of Alduro-Raynes Arabians, Inc. to enforce the sale of the horses to it under the agreement entered into by the Oppenheims and the Moreaus, the actions of Oppenheim in refusing to release the horses to the Moreaus can not constitute conversion. There are two cases from other jurisdictions which are on point. *Burroughs v. Garrett,* 352 P.2d 644 (Sup. Ct. New Mexico, 1960) involves the case where legal actions were filed and there was a question of ownership as to certain of the items, the Court held that there was no conversion of those items for which demand was made for the return. The case of *Gold Metal Product, Inc. v. Interstate Computer Services, Inc.,* 436 N.Y.S.2d 312 (Supreme Court N.Y., 1981), stands for the proposition that where chattels are held under Court Order, no unauthorized dominion over the chattels occurs as a matter of law. It must be presumed that the Supreme Court of Texas would hold in accord with the general rule absent authority to the contrary. Failure to so instruct the jury was therefore error as a matter of law and violative of the requirements of Rule 51, Fed. R. Civ. P.

10. The record is clear that from December 7, 1979, until April 3, 1980, the horses which are the subject of this suit were in "custodia legis" pursuant to an agreed order which required the horses to be held at Virginia Zimmerman's farm in Brenham, Texas, and which further required that no effort be made to change, in any way, the ownership of the horses. During that period of time, therefore, no recoverable damages could have been sustained by the Moreaus as a result of the inability of the Moreaus to register the horses, breed them or sell them. Further, there could be no tortious interference with the Moreaus' rights in and to said horses for that period of time. A party cannot be heard to complain of a wrong to which he has consented. The classic maxim applied by this Court is: "Volenti non fit injuria."

This proceeding hereunder was both an in personam action and an *in rem* proceeding, since the title to and right of possession of the horses was in question. The law is clear that the court which first acquires jurisdiction of the subject matter of a suit in rem holds it to the exclusion of any other court until its duty is fully performed, and to that end may enjoin the parties from proceeding . . . when the effect of the action would be to defeat or impair its own jurisdiction. *City of Orangeburg v. Southern Ry. Co.*, 134 F.2d 890 (C.A. 4, 1943). Since the effect of the order of December 7, 1979, was to protect the jurisdiction of the Trial Court, the Court should have so instructed the jury. Failure to do so was error and requires reversal of this judgment.

11. The Intervenor, Virginia Zimmerman, filed her petition in intervention, seeking to recover the costs of stabling certain of the horses which had been stabled at her farm pursuant to the Order of December 7, 1979. Her

Petition clearly sought to have the costs of stabling and her attorney's fees assessed against the party who was determined to be the owner of the horses. To have these costs assessed against Petitioners is contrary to the relief sought by the pleadings. This portion of the Court of Appeals opinion together with the Trial Court's judgment violates the well settled rule that a decree must relate specifically and exclusively to the pleadings and proof. *United Transp. Union v. State Bar of Michigan,* 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(713) 821-8819
Attorney for Petitioners

Appendix

APPENDIX A

Jacques MOREAU, et al.,
Plaintiffs-Appellees,

v.

Egon OPPENHEIM, et al.,
Defendants-Appellants,

v.

Virginia H. ZIMMERMAN,
Intervenor-Appellee.

ALDURO-RAYNES ARABIANS, INC.,
Plaintiff-Appellant,

v.

Jacques MOREAU, et al.,
Defendants-Appellees.

Nos. 81-2159, 81-2279.

United States Court of Appeals,
Fifth Circuit.

Dec. 2, 1981.

Horse breeding operation located in Texas brought suit for damages and declaratory judgment in state court, and action was removed to the United States District Court for the Southern District of Texas and consolidated with suit brought by French citizens formerly engaged in breeding of pure-blood Arabian horses in southern France alleging fraud, breach of fiduciary duty, conversion, tortious interference with contract, and civil conspiracy. The United

States District Court for the Southern District of Texas, at Houston, George E. Cire, J., rendered judgment on verdict for French citizens on four of the five asserted causes of action, and enjoined American citizens from attempting to prevent French citizens from registering their horses and from initiating or facilitating deportation proceedings against the French citizens. The Court of Appeals, Gee, Circuit Judge, held that: (1) jury verdict was untainted by plain error and was supported by ample evidence; (2) alleged violation of immigration laws by French citizens did not deny them right to seek damages against American citizens for tortious interference with prospective business relations and other counts; (3) district court did not err in refusing instruction stating that only a shareholder may complain of removal of corporate officer; (4) district court did not err in failing to require joinder of two individuals which American citizens claimed were indispensable parties; (5) district court did not err in failing to charge jury as to "the evidentiary presumptions of law pertaining to contractual relationships;" (6) district court properly assessed attorney fees for intervenor against losing party; (7) American citizens had no valid claim for reimbursement of livery expenses and could be found guilty of conversion when they refused to allow horses to be removed from their farm; (8) trial court properly allowed French citizens to recover damages for period during which horses were subject to court injunction prohibiting their sale; and (9) district court properly assessed fees of commercial stable that cared for horses pending litigation as costs to losing party.

Affirmed, remanded in part.

Joe A. Izen, Jr., Houston, Tex., for Raynes Arabians.

L. T. Bradt, Spring, Tex., for Oppenheim in No. 81-2159, and for defendants-appellants in No. 81-2279.

William Pannill, Houston, Tex., for plaintiffs-appellees in No. 81-2159.

James L. Walker, Houston, Tex., for intervenor-appellee.

Reynolds, Allen, Cook, Pannill & Hooper, Houston, Tex,. for plaintiffs-appellees in No. 81-2279.

John O. Tyler, Jr., for plaintiffs-appellees in both cases.

Appeals from the United States District Court for the Southern District of Texas.

Before GEE and RUBIN, Circuit Judges, and SPEARS,* District Judge.

GEE, Circuit Judge:

This case turns on the construction of a series of transactions between the Oppenheims, American owners of a horse-breeding operation in Texas, and the Moreaus, French citizens formerly engaged in the breeding of pure-blood Arabian horses in southern France. The central question at trial was whether the Moreaus had been the victims of a scheme involving malicious overreaching or whether they had simply backed out of a contract that had gone sour. As might be expected, the parties' descriptions, both at trial and on appeal, of the terms of the agreements at issue vary considerably.

According to the Moreaus' version, they were approached by the Oppenheims with a proposal whereby the Op-

* District Judge of the Western District of Texas, sitting by designation.

penheims would obtain the use of the Moreaus' horses while the Moreaus would retain ownership. In furtherance of this, the parties entered into a "joint venture." A 1979 Memorandum of Understanding between the parties provided, in two language transcriptions that differed in material content, for the formation of a corporation. By the French transcription, the Moreaus and the Oppenheims would each contribute $30,000, the parties would have equal voting and nonvoting stock, and in no event would stock be issued to any party prior to the Moreaus' arrival in the United States to stay. The English version of the memorandum, unbeknownst to the Moreaus —who allegedly could not read English and who relied on the Oppenheims for interpretation of the documents— provided for the corporation's formation within sixty days and contained other material variations from the French one. The Oppenheims represented to them, the Moreaus testified at trial, that various contractual provisions contained in both transcriptions including a provision in the memorandum that the horses would be sold to the corporation, would not be enforced but were needed for "immigration purposes." Alduro-Raynes Arabians, Inc. was incorporated on May 10, 1979. The parties were duly elected officers and directors. According to the Moreaus' testimony, the Oppenheims represented to them that no stock would be issued until each party paid $30,000 and in no case before the Moreaus arrived in the United States to stay. On October 19, 1979, however, the Oppenheims held a meeting of the shareholders, allegedly without notice to the Moreaus, at which the Moreaus were removed as directors and, at a subsequent directors' meeting, were removed as officers. The Moreaus then arrived in the United States with their eight horses.

At a meeting between the parties on November 22, 1979, at the Oppenheims' farm, the Oppenheims demanded that the Moreaus sell Arbor, the Moreaus' prize stallion that had recently won the European championship, and the other horses to the corporation. When the Moreaus balked at this, the Oppenheims refused to permit the horses to be removed from their farm. The Oppenheims then terminated the Moreaus' formal employment by Alduro-Raynes and encouraged the immigration authorities to deport the Moreaus from the United States on the basis that they were now in violation of their entry visas.

The Oppenheims describe their agreement with the Moreaus as one to import the horses into the United States, where the horses, particularly the stallion Arbor, would be sold to Alduro-Raynes. They deny that they made any oral representations to the contrary concerning the sale of the horses. The Oppenheims further deny that the Moreaus relied on them for interpretation of their "arms-length" contract and assert that, because they were so anxious to leave France, the Moreaus were the first to propose the sale of the horses to the American corporation. According to the Oppenheims, the Moreaus were properly removed as directors and officers of Alduro-Raynes because, while the Oppenheims had deposited money with the corporation and had been properly issued shares, the Moreaus had not done anything to fulfill their part of the bargain by October 1979. The Oppenheims further deny that there was ever any intention to form a joint venture, assert that, while they composed the original draft of the agreements, the Moreaus drafted the final versions, and deny that there was ever any agreement prohibiting the issuance of stock before the Moreaus' arrival in the United States. Other factual assertions made

by the Oppenheims at trial and on appeal are discussed, together with their legal arguments, below.

Alduro-Raynes first brought suit for damages and declaratory judgment in Texas state court, but this action was removed by the Moreaus to the Southern District of Texas and consolidated with the Moreaus' suit alleging fraud, breach of fiduciary duty, conversion, tortious interference with contract, and civil conspiracy. During the course of proceedings, one Zimmerman was appointed receiver of the horses. On December 7, 1979, an agreed injunction was entered, prohibiting any party from selling, transferring, or in any way attempting to change the ownership status of the horses pending further order of the United States district court. The suit proceeded to trial, the jury rendering a verdict on March 5, 1981, for the Moreaus on four of the five asserted causes of action—fraud, breach of fiduciary duty, conversion, and tortious interference with business and contractual relations—and assessing $50,000 in compensatory damages. The jury further found that the Oppenheims' actions were done willfully and intentionally or with callous and reckless indifference to the rights of the Moreaus but declined to award punitive damages. The district court entered judgment and assessed as costs the amount claimed by the receiver for the care of the animals and, in addition, attorneys' fees. The horses (except Arbor, who had died in April 1980) were released to the Moreaus in May 1981, but both before and after trial the Oppenheims contacted the Arabian Horse Registry of America in an effort to prohibit the registration of the horses in this country, thus successfully prohibiting the Moreaus from breeding their horses and selling the offspring.

This court granted a stay of the money damages of the judgment, along with expedited appeal. We referred the Moreaus' request for a post-judgment injunction to the district court, and on June 17, 1981, the trial court enjoined the Oppenheims from "attempting to prevent the Moreaus from registering their horses with the Arabian Horse Registry of America, Inc." and from initiating or facilitating deportation proceedings against the Moreaus. The Oppenheims here appeal from the March 23, 1981, judgment, as well as from the post-judgment relief granted, alleging numerous points of error in the proceedings in the district court. We affirm.

I. *Sufficiency of the evidence.*

[1] The Oppenheims assert that the trial court erred in failing to hold that, "as a matter of law," the appellants were entitled to recover damages from the appellees for breach of contract and interference with business relations. This is a thinly disguised claim that there was an insufficient evidentiary basis for the jury's verdict. Appellants, however, do not show that they filed motions for either directed verdict or judgment notwithstanding the verdict, and thus our review is limited to recognition of plain error apparent on the face of the record. Wright & Miller, *Federal Practice & Procedure*: Civil § 2536 (1971); *Little v. Bankers Life & Casualty Co.*, 426 F.2d 509, 511 (5th Cir. 1970).

[2] Much of the evidence at trial presented the jury with credibility choices between witnesses. Our review of the trial record leaves us with little doubt that the jury verdict is untainted by plain error and is, to the contrary, supported by ample evidence. Repeatedly, the jury saw the trial testimony of the Oppenheims impeached

by reference to their earlier deposition testimony. They heard Mrs. Oppenheim admit that she and her husband never had any intention of contributing $30,000 to Alduro-Raynes, as stipulated in the memorandum of understanding between the parties.[1] Mr. Oppenheim testified that he mailed the Moreaus a notice of the directors' meeting (in which the Moreaus would be removed from the corporate board) only two days before the meeting was to be held, knowing full well that the letter would take a minimum of four days to reach the Moreaus abroad.

The jury also heard Mrs. Oppenheim apparently contradict her own trial testimony on an important issue. In brief, the central factual issue on which both the Moreaus' and the Oppenheims' contract claims turned was a simple one: did the contract provide and did the parties intend from the outset to have title to the horses transferred to the Alduro-Raynes corporation, or did the

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1. Q. Mrs. Oppenheim, all I want you to do is tell the jury the truth. I want you to tell them whether or not it was ever your intention to pay $30,000.00 cash to this corporation or whether you were going to contribute a truck, a tractor and a trailer and other equipment in lieu of your $30.000.00.
A. We were not going to pay cash $30,000.00 because all that you mentioned plus the feed, the hay, the Alfalfa and everything in storage was in excess of $30,000.00.
Q. All right. And it is true, then, that you were going to make contributions in the form of hay and feed and equipment and you wouldn't have to put up $30,000.00? That is your testimony, isn't it?
A. That is true, because the $30,000.00 from us, plus the $30,000.00 from them was toward management, the operation of the farm, which costs about $10,000.00 a month.
Q. Well, help me, if you will, please ma'am. Look at the English version, the French version or anything you want to. Tell us if you can find anything in those contracts where you are not going to pay $30,000.00, but you are going to contribute feed or equipment in lieu of $30,000.00. It is not in there, is it?
A. No, sir.

Oppenheims represent to the Moreaus that the horses were being formally conveyed to the corporation merely for "immigration purposes" and that the corporation would never own the horses. Although both Mr. and Mrs. Opepnheim early in the trial vehemently denied having made *any* such representation, Mrs. Oppenheim admitted on the last day of testimony on direct examination no less than four times that such a representation had in fact been made.[2] The jury, therefore, had ample

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2. A. All right. Now, as of June 1979, were you present during discussions with the Moreaus concerning any problems with the importation of the horses?
A. Yeah. We have talked about that.
Q. All right. Did you ever make any representations to the Moreaus that the corporation would have to own their horses in order for the corporation to import—
A. In order for them—
Q. —in order for the corporation to import the horses?
A. Yes.
. . .
Q. . . . . Did you ever tell Madame Moreau to your knowledge that you recall, that the corporation had owned her horses *in order* for them to be imported?
A. Yes.
[COUNSEL FOR THE MOREAUS]: Your Honor, that question has been asked and answered four times.
THE WITNESS. Yes.
[MOREAUS' COUNSEL]: And she has answered "Yes" every time.
THE COURT: Okay.
[MOREAUS' COUNSEL]: I am objecting to this.
THE COURT: It must be the right answer.
[OPPENHEIMS' COUNSEL]: That's not my question. I don't think she answered that question, Your Honor.
THE WITNESS: Yes. The horses had to be imported. (Emphasis added.)

A generous interpretation of Mrs. Oppenheim's testimony would be that she only admitted to telling the Moreaus that the corporation would have to own the horses to import them but that she did not admit telling them that the corporation's ownership would only be a "sham" one, limited to the sole purpose of importing the horses. The jury, however, was urged to adopt a less generous interpretation by Moreaus' counsel on closing argument. The jury was certainly entitled to take a dim view of what is ultimately ambiguous testimony.

grounds to conclude, inter alia, that the Moreaus' version of the agreement between the parties was the more accurate one and that the Moreaus—not the Oppenheims—had suffered damage from interference with business relations and contract rights.

II. *Illegality.*

The Oppenheims next urge us to hold that, as a matter of law, illegal aliens who cannot legally enter into contracts in this country cannot recover for tortious interference with prospective contracts. The Oppenheims would have this court overturn the jury verdict below on the ground that the Moreaus represented to the United States Immigration & Naturalization Service that they were shareholders in a Texas corporation to which they would sell their horses and that the Moreaus did this in order to obtain their visas, yet never had any intention of selling their horses to the corporation and were therefore in the United States as a result of false representations in violation of 8 U.S.C. § 1325,[3] and 18 U.S.C. § 1546.[4] Arguing that the Moreaus' misrepresentation

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3. Any alien who . . . obtains entry to the United States by a willfully false or misleading representation or the wilful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000, or both.

8 U.S.C. § 1325.

4. 18 U.S.C. § 1546 states, in pertinent part:

Whoever knowingly makes under oath any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations

amounts to a felonious conspiracy to defraud the United States under 18 U.S.C. § 371,[5] the Oppenheims contend that any contracts entered into by the Moreaus would be the illegal fruits of such a conspiracy and cannot be enforced.

Alternatively, the Oppenheims argue that, even if the Moreaus had made no misrepresentations to the United States immigration authorities in their initial entry into the United States, their subsequent "refusal to work for the Alduro-Raynes corporation effected a failure to maintain the status under which they were admitted into this country" and required them to depart this country under 8 U.S.C. § 1184(a).[6]

In either case, the Oppenheims urge us to hold that the Moreaus, as illegal aliens, had no right to come into federal court and demand damages for "what [they] could

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prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

5. 18 U.S.C. § 371 provides, in part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

6. 8 U.S.C. § 1184(a) states:

(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe . . . to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

have earned by entering into and performing illegal employment in violation of the regulations and laws of the United States." To this end, the Oppenheims attempt to distinguish cases permitting aliens to utilize our courts[7] on the ground that these were instances of aliens who were legally in this country and were attempting to recover for their *past* labors, whereas here allegedly illegal aliens are claiming tortious interference with *prospective* business relations.

[3] The Moreaus argue that the Oppenheims' illegal-alien contention was never set forth in a pleading below pursuant to Fed. R. Civ. P. 8(c) and is not open to review here. We disagree. The Oppenheims' second amended answer alluded, albeit ambiguously, to a defense of "illegality." Further, counsel for the Oppenheims stated in the charge conference that, "It would be our position that the Moreaus had no legal status to work in the United States which could be recognized to give them this tortious interference with business relations and contract rights." But, while reviewable, the Oppenheims' illegality claims are wholly without merit.

[4] Each part of the Oppenheims' novel argument is bound by tenuous threads that unravel upon examination. In the first place, questions of the Moreaus' immigration status or of their alleged violation of the immigration laws were never presented at trial, and we cannot be expected to answer them here. *See, e.g., Arteaga v. Allen,* 99 F.2d 509, 510 (5th Cir. 1938). Contrary to the Oppenheims' allegations, there is no evidence in the record that the Moreaus entered this country illegally. The

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7. *See, e.g., Takahashi v. Fish & Game Commission,* 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); *Roberto v. Hartford Fire Ins. Co.,* 177 F.2d 811 (7th Cir. 1948).

Oppenheims have not shown that deportation hearings were under way against the Moreaus and, in fact, by their motions in limine prior to trial, the parties agreed not to mention the existence or nonexistence of such proceedings or to make any reference of any kind to the immigration status of the Moreaus. Second, we question, without necessarily resolving, the Oppenheims' argument that a misrepresentation in violation of 8 U.S.C. § 1325 and 18 U.S.C. § 1546 results in a withdrawal of the access to federal court guaranteed all "persons" under the due process clause of the fourteenth amendment as codified at 42 U.S.C. § 1981.[8] Even assuming that violations of the immigration laws by the Moreaus occurred, the remedy for these violations is, according to the statutes cited, criminal sanctions, not denial of access to court. We seriously doubt whether illegal entry, standing alone, makes outlaws of individuals, permitting their contracts to be breached without legal accountability. *See, e. g., Arteaga v. Allen, supra; Martinez v. Fox Valley Bus Lines, Inc.*, 17 F.Supp. 576 (N.D. Ill. 1936). Third, the Oppenheims' alternative allegation—that the Moreaus' refusal to complete their contractual agreement put them in violation of their visas—is a hollow and empty Trojan horse in the context of this case. The argument assumes central contested issues at trial: whether any party was in breach of contract and whether *a* contract existed. On one view of the facts, the view accepted by

8. 42 U.S.C. § 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

the jury and which we do not disturb, the Oppenheims' malicious termination of the Moreaus' employment with Alduro-Raynes was responsible for putting the Moreaus in technical violation of their visas. Given this jury finding, the Oppenheims are estopped from claiming that the absence of an employment contract makes the presence of the Moreaus in this country illegal.[9]

III. *Shareholder standing.*

The Oppenheims' third major quarrel with the proceeding below concerns the absence of a jury instruction stating that only a shareholder may complain of the removal of a corporate officer. The district court below refused such an instruction and instead informed the jury of the Moreaus' claim of breach of fiduciary duty:

> Under this legal theory the Moreaus claim that the Oppenheims breached their fiduciary duties to them by the holding of a shareholders' and a directors' meeting of the corporation in October of 1979 and removing the Moreaus as directors and officers.
>
> A fiduciary relation applies to any person who occupies a position of confidence toward another. It is a relationship involving trust and confidence. A fiduciary relationship exists where special confidence is placed in another who in equity and good conscience is bound to act in good faith and with due regard to the interest of the one reposing the confidence.
>
> You will find for the Moreaus on their claim for breach of fiduciary relationship if you find that they

9. Note that in so doing we are not *enforcing* an illegal contract, as the Oppenheims claim. Even accepting the Oppenheims' questionable view of immigration law as correct, it would be the absence of employment that would make the Moreaus' presence in this country illegal.

> have proved by a preponderance of the evidence that a fiduciary relation existed between the Moreaus and the Oppenheims and that the Oppenheims failed to act in good faith with due regard to the Moreaus' interest. You will find for the Oppenheims on this claim if you find that the Moreaus have failed to prove by a preponderance of the evidence that a fiduciary relationship existed or if you find that the Oppenheims have proved by a preponderance of the evidence that they have acted in good faith and with due regard to the Moreaus' interest.

The Moreaus admit that they did not contribute any funds to the corporation and were therefore not entitled to any stock. They counter, however, by citing *Thompson v. First State Bank of Amarillo*, 109 Tex. 419, 211 S.W. 977 (1919), and article 12, section 6 of the Texas Constitution,[10] codified in article 2.16 of the Texas Business Corporation Act,[11] arguing that "stock issued to appellants [the Oppenheims] and voted by them was for an insufficient consideration and for which full and lawful payment was not made. . . . [A]s such, any exercise of the rights which normally accompany stock ownership is void."

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10. "Sec. 6. No corporation shall issue stock of bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void."

11. The Act states, *inter alia*:

> A. The consideration paid for the issuance of shares shall consist of money paid, labor done, or property actually received. Shares may not be issued until the full amount of the consideration, fixed as provided by law, has been paid. When such consideration shall have been paid to the corporation or to a corporation of which all of the outstanding shares of each class are owned by the corporation, the shares shall be deemed to have been issued and the subscriber or shareholder entitled to receive such issue shall be a shareholder with respect to such shares, and the shares shall be considered fully paid and non-assessable."

[5] We do not need to resolve the question of whether the Alduro-Raynes stock issuance was in fact void. On our review of the record, there was ample reason for the trial judge to conclude that an instruction on shareholders' standing was not applicable to the Moreaus' claim and would only confuse the jury. In this case there was evidence that the Moreaus, French citizens who purportedly spoke little or no English, trusted the Oppenheims to explain the transaction and the American law on which the "joint venture" would be based. The trial court correctly viewed the dubious corporate legality of Alduro-Raynes as irrelevant. The real issues for the jury to determine were whether a fiduciary relationship existed between the parties and whether the duty to inform the Moreaus concerning the directors' meeting and to act according to their fiduciary obligations was breached by the Oppenheims. The "shareholder status" of the Oppenheims vis-a-vis the Moreaus is insignificant if, in achieving that status, the Oppenheims breached a fiduciary relationship.

[6] *Thompson v. First State Bank of Amarillo, supra,* is instructive. In that case the Texas Supreme Court found that a subscriber to bank stock who gave only a promissory note for issuance of corporate stock was estopped from asserting the invalidity of the issuance in a creditor's suit to enforce the note. In this case, the Oppenheims' purported breach of their fiduciary relationship—including their issuance of shares without consideration and subsequent ouster of the Moreaus as corporate officers without notice—prevented the Moreaus from achieving shareholder status. The district court was correct to direct the jury to the question of the existence of the fiduciary duty. If the Oppenheims breached their duty, they are estopped

from claiming a defense based on that breach. If the Moreaus cannot claim shareholder status, the Oppenheims who never fulfilled their part of the agreement as to contributive share either, can hardly claim this status. It is a well-established rule of equity that one who by his conduct has induced another to act in a particular manner should not be permitted to adopt an inconsistent position and thereby cause loss or injury to the other.

IV. *Indispensable parties.*

The Oppenheims claim error in the district court's failure to require the joinder of Florence and Sylvie Moreau-Sipiere. The Oppenheims claim that these two individuals were owners of two of the horses and were indispensable parties to Alduro-Raynes' declaratory action for title to the horses. The district court below denied the Oppenheims' motion to dismiss for lack of indispensable parties.

[7-9] Assuming that the Oppenheims are correct and that these two individuals do have an ownership interest in the horses, the appellants' reliance on Rule 19, Fed. R. Civ. P.,[12] is misplaced. Under the flexible federal joinder rules, "pragmatic concerns rather than conclusory labels

12. Rule 19(a), Fed. R. Civ. P., states, in pertinent part:
Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest . . .

now control." Wright & Miller, *Federal Practice & Procedure*: Civil § 1612 (1972). *See also Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 118-19, 88 S.Ct. 733, 742-743, 19 L.Ed.2d 936 (1968). Cases under Rule 19 stress the equities of a particular case, not conclusory classifications of property rights. Rule 19 permits courts to retain jurisdiction "where the interests of substantial justice require it," *Rippey v. Denver United States National Bank,* 260 F.Supp. 704, 708 (D. Colo. 1966), and this means, as the rule itself states, that an interest in disputed property does not make a party indispensable unless in his absence relief is impossible or the absent person is likely to be prejudiced or his absence will lead to multiple litigation. *See, e.g., Hansen v. Peoples Bank of Bloomington,* 594 F.2d 1149 (7th Cir. 1979); Wright & Miller, *Federal Practice & Procedure*: *Civil* § 1609 (1972). The Oppenheims do not and presumably cannot argue that the absentees were prejudiced by the judgment actually rendered, and they cannot claim to face future duplicitous litigation as a result of the trial court's failure to join these two parties. The Oppenheims were never in a position to claim relief that they could have sought to assert against the absent persons, and the absent parties' rights were never implicated in the questions for jury decision below. Thus, since the traditional appellate court concerns when failure to join an indispensable party is urged as error are absent here, the Oppenheims' claim must fail.

V. *Jury instructions.*

[10] The jury was charged as to the breach of contract claim as follows:

> The Oppenheims and Alduro-Raynes Arabians, Inc. contend that the Moreaus breached their con-

> tractual duty under the memorandum of understanding by failing to convey title to the horses to the to the corporation, Alduro-Raynes Arabians, Inc. In order for you to find that there has been a breach of contract by the Moreaus, you must find that the Oppenheims or Alduro-Raynes Arabians, Inc., have proved by a preponderance of the evidence that the Moreaus actually agreed to convey title to their horses to the corporation as written in the memorandum of understanding. The Moreaus deny that there was such an agreement and say that the language having to do with the transfer of title was inserted in the memorandum of understanding solely for the purpose of aiding in their immigration and in the importation of the horses into the United States.

The Oppenheims allege that the jury should have been charged as to "the evidentiary presumptions of law pertaining to contractual relationships." This claim is meritless. The parties cite us to no case in which such an omission is found to constitute an abuse of the broad discretion federal courts enjoy in this area. Here the district court could well have concluded that amplification of the jury charge was unnecessary, *i.e.*, that ordinary citizens know that parties are usually bound by what they sign. Alternatively, the judge could have decided that, since the Moreaus signed conflicting versions of the memorandum of understanding, the requested instruction would only prove confusing or misleading to the jury. *See generally* Wright & Miller, *Federal Practice & Procedure*: Civil § 2556 (1971).

[11] The Oppenheims' second challenge is directed at the jury instructions concerning fraud. The court instructed the jury that:

> The Moreaus contend that the following representations made by the Oppenheims constitute fraud . . . Representations made concerning American Texas law and Egon Oppenheim's power as president of a corporation.

The argument is that fraud cannot be predicated upon misrepresentation as to matters of law. The short answer to this is that a misrepresentation of law between fiduciaries is a horse of a different color. *Meachum v. Halley*, 103 F.2d 967 (5th Cir.) *cert. denied*, 308 U.S. 572, 60 S.Ct. 86, 84 L.Ed. 480 (1939) (misrepresentation of law between fiduciaries may be actionable); *Safety Casualty Co. v. McGee*, 133 Tex. 233, 127 S.W.2d 176, 177 (Com'n App. 1939).

VI. *Other claims.*

[12] The Oppenheims' litany of other claims of error can be briefly disposed of. Those based on the district court's failure to realign the parties and its denial of Alduro-Raynes' alleged procedural right to open and close the case are frivolous. The matter of a court's allocation of the right to open and close, even if it properly belonged to Alduro-Raynes, does not go to the merits of a controversy and has long not been the subject of writ of error,[13] even when coupled with the denial of requested party realignment. *Commercial Iron & Metal Co. v. Bache Halsey Stuart, Inc.*, 581 F.2d 246, 250 (10th Cir. 1978). The decision rests with the sound discretion of the trial court. *Martin v. Chesebrough-Pond's, Inc.*, 614 F.2d 498, 501 (5th Cir. 1980).

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13. *See, e.g., Day v. Woodworth*, 54 U.S. 363, 14 L.Ed. 181 (1851).

[13] Certain invoices relating to the importation of the horses, while perhaps admissible evidence, were not shown to have implicated a substantial right, and the court did not abuse its discretion in excluding them from evidence. Fed. R. Evid. 103(a); Fed. R. Civ. P. 61; *United States v. Medel*, 592 F.2d 1305, 1314 (5th Cir. 1979).

[14, 15] The court also did not act improperly when it assessed attorneys' fees for the intervenor, Zimmerman, against the losing party. The Oppenheims make no serious contention that there is a genuine factual issue as to the amount of recoverable attorneys' fees. As stated in 6A Moore, *Federal Practice* ¶ 59.05[4] (2d ed. 1979), "It would be a mere formality to order a partial new trial limited to the issue of damages when the court could immediately thereafter grant summary judgment for the undisputed amount." As the First Circuit put it in *Decato v. Travelers Insurance Co.*, 379 F.2d 796, 798 (1st Cir. 1967):

> The constitutional rule against additur . . . is not violated in a case where the jury had properly determined liability and there is no valid dispute as to the amount of damages. In such a case the court is in effect simply granting summary judgment on the question of damages.

(footnote omitted). As in that case, "the only question here is whether the damages were truly in dispute, or were conclusively shown." *Id.* at 799 (footnote omitted). *See also Stentor Electric Manufacturing Co. v. Klaxon Co.*, 125 F.2d 820, 826 (3d Cir. 1942) (addition to verdict of an amount due as interest does not revise jury's verdict when New York statute allows for such interest and it did not appear that jury was so instructed).

[16] The Oppenheims' claim that they could not have been guilty of conversion when they refused to allow the horses to be removed from their farm in November 1979 because they had "a valid claim for reimbursement of livery expenses" fails to take into account the crucial fact that their claim of right is grounded on action that a jury, on the basis of solid evidence, has determined to be fraudulent. Although it is true that the Oppenheims stabled the horses for twenty days prior to the November 23, 1979, meeting between the parties, a jury has in effect determined that the Moreaus allowed their horses onto the Oppenheims' farm because of false pretenses. No case under article 5502, V.A.T.C.S.,[14] establishes a right to a lien under these circumstances.

[17] Next the Oppenheims argue that the court should not have allowed the Moreaus to recover damages for the period during which the horses were subject to a court injunction prohibiting their sale, pointing out that, first the December 7, 1979, order prevented horse breeding and selling of offspring so that the Moreaus did not suffer from any interference with business relations during this period and, second, that even if the order did not prevent such actions, the harm claimed by the Moreaus could have been mitigated. The court injunction at issue prevented the parties from taking "any steps to sell, purchase, or otherwise change the ownership status of any of the horses listed in paragraph 2 pending the hearing

14. Art. 5502, V.A.T.C.S., states:

Properties of livery or public stables shall have a special lien on all animals placed with them for feed, care and attention, as also upon such carriages, buggies or other vehicles as may have been placed in their care, for the amount of the charges against the same; and this article shall apply to and include owners or lessees of pastures, who shall have a similar lien on all animals placed with them for pasturage.

on motion for preliminary injunction." The order preserved the status quo ante regarding ownership status of the horses and in effect told the parties to "hold their horses." The order can plausibly be read as preventing the selling of offspring. Nonetheless, the jury awarded the Moreaus $50,000 as compensatory damages. Insofar as a portion of these damages was designed to compensate for failure to deal during the period covered by the court injunction, this was justified given the fact that the court's order, even if it did prevent the selling of offspring, would not have been necessary had the Oppenheims not breached their contract to begin with. Therefore, the harm suffered during this period was attributable to the Oppenheims' actions and not to the court order. The Oppenheims are also inappropriate parties to claim the benefit of a duty to mitigate, since there was abundant evidence that the Oppenheims actively prevented the Moreaus from registering their horses with the Arabian Horse Registry of America. Without such registration, mitigation of damages by, for example, selling of offspring was shown to be effectively impossible.

[18] The appellants also claim error in the court's assessment of the receivership costs. The court assessed the fees of the commercial stable that cared for the horses pending litigation as costs to the losing party. The Oppenheims allege on appeal that the parties stipulated that these costs should be assessed against the party determined to be the rightful owner of the horses. A review of the record, however, fails to convince us that this was the case. On the contrary, the court stated to the parties at post-trial conference that the receivership fees would be taxed as costs against the losing party. Appellants' other claims are entirely frivolous and merit no discussion.

The Oppenheims' extraordinary position below was that their Alduro-Raynes corporation controlled entirely by them and with not one share owned by the Moreaus, somehow "bought" extremely valuable Arabian horses without paying their owners, the Moreaus, one red cent. The jury, able to distinguish between a gift horse and a swindle, found to the contrary of this position on evidence amply sufficient. Nothing remains to say, and here it ends.

For the reasons stated above, we grant the motion of the intervenor-appellee for termination of the receivership and award of costs and attorneys' fees but remand for determination of the proper additional costs due Zimmerman, the intervenor-appellee for attorneys' fees incurred in this appeal.[15] We affirm the district court in all respects, including its assessment of these costs and fees against the losing parties below and its grant of post-judgment injunctive relief against the Oppenheims. We deny the appellants' plea for injunctive relief pending appeal.

AFFIRMED, REMANDED in part.

15. The attorney for the intervenor-appellee omitted to state the number of billed hours or his hourly rate in his motion for additional attorneys' fees.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 81-2159 and 81-2279

JACQUES MOREAU, ET AL.,
Plaintiffs-Appellees,
versus
EGON OPPENHEIM, ET AL.,
Defendants-Appellants,
versus
VIRGINIA H. ZIMMERMAN,
Intervenor-Appellee.

ALDURO-RAYNES ARABIANS, INC.,
Plaintiff-Appellant,
versus
JACQUES MOREAU, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(JANUARY 25, 1982)

Before GEE and RUBIN, Circuit Judges, and SPEARS,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge

CLERKS NOTE:

See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate.

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* District Judge of the Western District of Texas, sitting by designation.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-79-2421

JACQUES MOREAU, ERMINE MOREAU-SIPIERE, XAVIER MOREAU-SIPIERE, and ERIC MOREAU-SIPIERE,
Plaintiffs

v.

EGON OPPENHEIM and NELLY OPPENHEIM,
Defendants

and

CIVIL ACTION NO. H-79-2443

ALDURO-RAYNES ARABIANS, INC.,
Plaintiffs

v.

JACQUES MOREAU, ET UX, ERMINE MOREAU, XAVIER MOREAU, and ERIC MOREAU,
Defendants

JUDGMENT

BE IT REMEMBERED that on the 18th of February, 1981, came on to be heard the above-numbered and styled causes of action, wherein Jacques Moreau, Ermine Moreau-Sipiere, Xavier Moreau-Sipiere, and Eric Moreau-Sipiere, hereinafter referred to as Plaintiffs, and Egon Oppenheim, Nelly Oppenheim, and Alduro-Raynes Arabians, Inc., hereinafter referred to as Defendants, all

appeared by and through their attorneys of record. Intervenor Virginia H. Zimmerman, having previously been appointed by the Court as a Receiver with the agreement of all parties thereto, and it being previously stipulated by the parties that the amounts claimed by Intervenor Virginia H. Zimmerman were both correct and reasonable, Intervenor Virginia H. Zimmerman was excused from being present at the trial of these causes of action. All other parties announced ready for trial. A jury was duly and properly impaneled and sworn, the cause proceeded to trial before said jury, and the said jury having heard evidence and arguments of counsel, all parties rested. The jury did, upon their oath, on March 5, 1981, render their verdict answering special interrogatories in response to a written charge of this Court.

That written charge contained the following special issues which the jury answered in the following manner:

1a. With regard to the Moreaus' claim for fraud against the Oppenheims, how do you find?

Answer either "For the Moreaus" or "For the Oppenheims."

ANSWER: (to which the jury answered "For the Moreaus").

If you have answered question 1a "for the Moreaus," answer question 1b.

1b. Do you find that the Oppenheims' actions were done willfully, intentionally or with callous and reckless indifference to the rights of the Moreaus?

Answer "We do" or "We do not."

ANSWER: (to which the jury answered "We do").

2a. With regard to the Moreaus' claim for conspiracy against the Oppenheims, how do you find?

ANSWER: (to which the jury answered "For the Oppenheims").

If you have answered question 2a "for the Moreaus," answer question 2b.

2b. Do you find that the Oppenheims' actions were done willfully, intentionally or with callous and reckless indifference to the rights of the Moreaus?

ANSWER: (which the jury did not answer).

3a. With regard to the Moreaus' claim for breach of fiduciary duty against the Oppenheims, how do you find? Answer either "For the Moreaus" or "For the Oppenheims."

ANSWER: (to which the jury answered "For the Moreaus").

If you have answered questions 3a "for the Moreaus," answer question 3b.

3b. Do you find that the Oppenheims' actions were done willfully, intentionally or with callous and reckless indifference to the rights of the Moreaus?

Answer "We do" or "We do not."

ANSWER: (to which the jury answered "We do").

4a. With regard to the Moreaus' claim for interference with business relations and contract rights against the Oppenheims, how do you find?

Answer either "For the Moreaus" or "For the Oppenheims."

ANSWER: (to which the jury answered "For the Moreaus").

If you have answered question 4a "for the Moreaus," answer question 4b.

4b. Do you find that the Oppenheims' actions were done willfully, intentionally or with callous and reckless indifference to the rights of the Moreaus?

Answer "We do" or "We do not."

ANSWER: (to which the jury answered "We do").

5a. With regard to the Moreaus' claim for conversion against the Oppenheims, how do you find?

Answer either "For the Moreaus" or "For the Oppenheims."

ANSWER: (to which the jury answered "For the Moreaus").

If you have answered question 5a "for the Moreaus," answer question 5b.

5b. Do you find that the Openheims' actions were done wilfully, intentionally or with callous and reckless indifference to the rights of the Moreaus?

Answer "We do" or "We do not."

ANSWER: (to which the jury answered "We do").

6a. With regard to the Oppenheims' claim for fraud against the Moreaus, how do you find?

Answer either "For the Oppenheims" or "For the Moreaus."

ANSWER: (to which the jury answered "For the Moreaus").

If you have answered question 6a "For the Oppenheims," answer question 6b.

6b. Do you find that the Moreaus' actions were done willfully, intentionally or with callous and reckless indifference to the rights of the Oppenheims?

Answer "We do" or "We do not."

ANSWER: (which the jury did not answer).

7. With regard to the claim of the Oppenheims and Alduro-Raynes Arabians, Inc., for breach of contract against the Moreaus, how do you find?

Answer either "For the Oppenheims and the Corporation" or "For the Moreaus."

ANSWER: (to which the jury answered "For the Moreaus").

If you have answered "For the Moreaus" to any of questions 1a, 2a, 3a, 4a, or 5a, then answer question 8.

8. What do you find from a preponderance of the evidence to be the amount of damages caused to the Moreaus by the Oppenheims.

In ariving at your answer to the foregoing questions, you may consider only such loss of income as was sustained by the Moreaus as a result of their inability to register, breed, and sell their horses in the United States during the period from November 24, 1979, until the present time.

Answer in dollars and cents, if any.

ANSWER: (to which the jury answered $50,-000.00).

If you have answered "We do" to any of questions 1b, 2b, 3b, 4b, or 5b, then answer question 9.

9. What amount of money do you assess against the Oppenheims as punitive damages. Answer in dollars and cents, if any.

ANSWER: (to which the jury answered no dollars and no cents).

If you have answered either question 6a "For the Oppenheims" or question 7 "For the Oppenheims and the Corporation," answer question 10.

10. What do you find from a preponderance of the evidence to be the amount of damages caused to the Oppenheims by the Moreaus?

In ariving at your answer to the foregoing questions you may consider only such losses sustained by the Oppenheims for stabling the horses, providing veterinary services, and transporting the horses from New York City to Montgomery County. Answer in dollars and cents, if any.

ANSWER: (which the jury did not answer).

If you have answered "We do" to question 6b, answer question 11.

11. What amount of money do you assess against the Moreaus as punitive damages. Answer in dollars and cents, if any.

ANSWER: (which the jury did not answer).

12. What do you find from a preponderance of the evidence to be the amount of damages caused to Alduro-Raynes Arabians, Inc., for importation duties and insurance premiums on the horses in question. Answer in dollars and cents, if any.

ANSWER: (which the jury did not answer).

Said verdict was duly signed by the foreman of the jury and the verdict was rendered and received in open court and each juror attested in open court that same was the verdict of that juror. The Court being of the

opinion that judgment should be accordingly entered for the Plaintiffs, and the Court being of the opinion that Plaintiffs, Jacques Moreau, Ermine Moreau-Sipiere, Xavier Moreau-Sipiere, and Eric Moreau-Sipiere, should have judgment against Egon Oppenheim and Nelly Oppenheim, Defendants, in the sum and amount of Fifty Thousand ($50,000.00) Dollars, together with interest thereon at the rate of Nine (9%) percent per annum from the date of entry of this judgment, until paid in full and for all costs herein expended by Plaintiffs, Jacques Moreau, Ermine Moreau-Sipiere, Xavier Moreau-Sipiere and Eric Moreau-Sipiere, the Court makes the following orders:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs, Jacques Moreau, Ermine Moreau-Sipiere, Xavier Moreau-Sipiere and Eric Moreau-Sipiere, have and recover judgment from and against Defendants, Egon Oppenheim and Nelly Oppenheim in the sum and amount of Fifty Thousand ($50,000.00) Dollars, interest on such amount at the rate of Nine (9%) percent per annum from the date of the signing of this judgment until paid in full, and for costs of Court expended in this cause of action for all of which let execution issue;

IT IS FURTHER ORDERED that Plaintiffs shall have all such writs and orders as shall become, on Plaintiffs' behalf, necessary to enforce the execution thereof;

IT IS FURTHER ORDERED that Defendants Nelly and Egon Oppenheim and Alduro-Raynes Arabians, Inc. are not in any way the rightful and legal owners of any interest whatsoever in the horses brought by the Moreau-Sipiere family from France, nor of any offspring of said horses. Said horses are Arbor, Ruxia, Darduza, Arbora,

Fundira, Ouarbor, Pribor, Marax de Raynes, and their offspring are the foals Autan, Ardor, Accord, and Princier;

IT IS FURTHER ORDERED that all previous Orders of this Court regarding any or all of such horses are hereby dissolved;

IT IS FURTHER ORDERED that the bonds filed in this cause of action by the Plaintiffs and Defendants pursuant to the Agreed Order of this Court of December 7, 1979, are hereby dissolved and their sureties released;

IT IS FURTHER ORDERED that Defendants, Egon Oppenheim and Nelly Oppenheim pay to Intervenor-Receiver Virginia H. Zimmerman the amount of Five Thousand Seven Hundred Ninety One and 04/100 ($5,491.04) Dollars plus an additional Three Thousand Nine Hundred Two and 65/100 ($3,902.65) Dollars as reasonable and necessary attorney's fees and costs, said amounts totalling Nine Thousand Six Hundred Ninety Three and 69/100 ($9,363.69) Dollars.

IT IS FURTHER ORDERED that any and all other costs of Court not previously referred to above be taxed to Defendants Egon Oppenheim, Nelly Oppenheim, and Alduro-Raynes Arabians, Inc., both jointly and severally.

IT IS FURTHER ORDERED that all relief not expressly granted herein is hereby denied.

RENDERED AND SIGNED this 23rd day of March, 1981.

/s/ GEORGE E. CIRE
Judge Presiding

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APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-79-2421

JACQUES MOREAU, ERMINE MOREAU-SIPIERE, XAVIER MOREAU-SIPIERE, and ERIC MOREAU-SIPIERE,
Plaintiffs
v.
EGON OPPENHEIM and NELLY OPPENHEIM,
Defendants

and

CIVIL ACTION NO. H-79-2443

ALDURO-RAYNES ARABIANS, INC.,
Plaintiffs
v.
JACQUES MOREAU, ET UX, ERMINE MOREAU, XAVIER MOREAU, and ERIC MOREAU,
Defendants

CHARGE TO THE JURY

MEMBERS OF THE JURY:

Now that you have heard the evidence, it becomes my duty to give you the instructions of the Court as to the law applicable to this case. It is your duty as jurors to follow the law as stated in these instructions, and to apply the rules of law so given to the facts as you find them from the evidence in the case. You are not to single

out one instruction alone as stating the law, but you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

GENERAL INSTRUCTIONS

You, the Jury, are the sole and exclusive judge of the facts. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

All parties to this litigation, whether individuals or corporations, must be treated exactly alike insofar as their rights are concerned. This case should be considered and decided by you as an action between persons of equal standing in the community. A corporation is entitled to the same fair trial as a private individual. A resident citizen of France is entitled to the same fair trial as a resident citizen of the United States.

The Jury must consider only the evidence properly admitted in this case. Unless you are otherwise instructed, the evidence in the case always consists of the sworn

testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated. Statements and arguments of counsel are not evidence. They are only intended to assist the jury in understanding the evidence and the contentions of the parties. During the course of the trial it often becomes the duty of counsel to make objections and for the Court to rule on them in accordance with the law. The Jury should not consider or be influenced by the fact that such objections have been made. Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, and in weighing the testimony of each witness, consider his relationship to the parties in this case, his manner of testifying, his candor, fairness and intelligence, and the extent to which he has been confirmed or contradicted, if at all, by other credible evidence. You will rely upon your own good judgment, your own common sense and the experience you have gained as you have gone about your everyday affairs in weighing the evidence and determining the weight to be given to it. You are permitted to accept as true and worthy of belief everything that a particular witness may have said, or you are permitted to reject everything that a particular witness may have said. You may accept as true part of what a witness tells you and you may reject other portions of the testimony of the same witness.

A witness may be discredited or "impeached" by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of the statements. If you believe any witness has been impeached, and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion. You should consider such expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

You may, in your determination of the facts of this case, consider both direct and circumstantial evidence. Direct evidence is the testimony of a witness who actually saw an event occur. Circumstantial evidence is proof of a chain of circumstances pointing to the occurrence of a fact or the existence of a fact. Direct evidence occurs where a witness testifies as to the facts of his own knowl-

edge, matters which he saw and heard, and matters which came to him by virtue of his own senses or his own observation. As a general rule, the law makes no distinction between direct and circumstantial evidence and the fact that evidence is circumstantial does not render it incompetent nor destroy its probative force.

In a civil action such as this, each party asserting a claim, as hereafter described, has the burden of proving every essential element of his claim by a "preponderance of the evidence." A "preponderance of the evidence" means the greater weight and degree of the credible evidence admitted in this trial. To establish or prove by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence, as when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the Jury may, unless otherwise instructed, consider the testimony of all witnesses, regardles of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

When more than one claim is involved, as in this case, you should consider each claim, and the evidence pertaining to it, separately, as you would if each claim had been tried before you separately. If a preponderance of the evidence does not support each essential element of a claim, then the jury should find against the party having the burden of proof as to that claim.

The fact that I will later instruct you on the proper measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance in the event that you should find in favor of the Plaintiffs on the question of liability, by a preponderance of the evidence, and in accord with the other instructions.

SPECIFIC INSTRUCTIONS

Unless a certain party to this lawsuit is individually named in these instructions, the Plaintiffs Jacques Moreau, Ermine Moreau-Sipiere, Eric-Sipiere, and Xavier Moreau-Sipiere will be referred to as "the Moreaus" and the Defendants Egon Oppenheim and Nelly Oppenheim will be referred to as "the Oppenheims."

The Moreaus have asserted five separate claims against the Oppenheims. These are:

1. fraud
2. civil conspiracy
3. breach of fiduciary duty
4. interference with business relations and contract rights.
5. conversion

The Oppenheims have asserted two claims against the Moreaus. They are:

1. fraud
2. breach of contract

The corporation, Alduro-Raynes Arabians, Inc., has asserted one claim against the Moreaus for breach of contract.

These instructions will now be divided into separate discussions of each of these claims. Again, I must caution you that you must consider each claim and the evidence pertaining to it separately.

The Moreaus' Claims

1. *Fraud*

In order for the Moreaus to be entitled to recover their damages from the Oppenheims because of fraud, the jury must find that the Moreaus have established all of the following essential elements of fraud by a preponderance of the evidence:

First, that the Oppenheims made a material representation of fact. A representation is material if the transaction would not have been entered into had the representation not been made.

Second, that the representation was false.

Third, that when the representation was made the Oppenheims knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion.

Fourth, that the representation was made with the intention that it be acted upon by the Moreaus.

Fifth, that the Moreaus acted in reliance upon the representation and thereby suffered injury.

The Moreaus contend that the following representations made by the Oppenheims constitute fraud:

1. Representations made during the drafting of the Memorandum of Understanding in French and in English that certain provisions would not be enforced, specifically, that the provision requiring the Moreaus to sell the horses to the corporation would not be enforced.
2. Representations made concerning American and Texas law and Egon Oppenheim's power as president of a corporation.

If you find that the Moreaus have established each of the above elements of fraud by a preponderance of the evidence, then you should find for the Moreaus on this claim. If, on the other hand, you find that the Moreaus have failed to establish any one or more of the above elements of fraud, then you must find for the Oppenheims on this claim.

2. *Civil Conspiracy*

Under this legal theory, the Moreaus claim that the Oppenheims conspired with each other to wrongfully acquire ownership of assets of the Moreaus without compensation to the Moreaus through fraud and deceit.

A civil conspiracy is defined as a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. A conspiracy to defraud on the part of two or more persons means a common purpose, supported by a concerted action to defraud, that each has the intent to do it, and that it is common to each of them, and that each has the understanding that the other has that purpose.

It is not essential that each conspirator have knowledge of the details of the conspiracy. It is not required that each and every act of a conspirator be shown to have

been in concert with the others or that it be established by direct evidence that all combined at a given time prior to each transaction. Inferences of concerted action may be drawn from joint participation in the transactions and from enjoyment of the fruits of the transactions on the part of the conspirators.

In summary, the essential elements of a civil conspiracy are:

> *First,* a combination of two or more persons having a common purpose supported by concerted action to defraud;
>
> *Second,* with common intent to defraud and common understanding that each conspirator has that intent;
>
> *Third,* resulting in injury to another.

If you find that the Moreaus have established each of the essential elements of conspiracy by a preponderance of the evidence, then you should find for the Moreaus on this claim. If you find that the Moreaus have failed to establish any one or more of the above elements of conspiracy, then you must find for the Oppenheims on this claim.

3. *Breach of Fiduciary Duty*

Under this legal theory, the Moreaus claim that the Oppenheims breached their fiduciary duties to them by the holding of a shareholders' and a directors' meeting of the corporation in October of 1979 and removing the Moreaus as directors and officers.

A fiduciary relation applies to any person who occupies a position of confidence toward another. It is a relation-

ship involving trust and confidence. A fiduciary relationship exists where special confidence is placed in another who in equity and good conscience is bound to act in good faith and with due regard to the interest of the one reposing the confidence.

You will find for the Moreaus on their claim for breach of fiduciary relationship if you find that they have proved by a preponderance of the evidence that a fiduciary relation existed between the Moreaus and the Oppenheims and that the Oppenheims failed to act in good faith with due regard to the Moreaus' interests. You will find for the Oppenheims on this claim if you find that the Moreaus have failed to prove by a preponderance of the evidence that a fiduciary relationship existed or if you find that the Oppenheims have proved by a preponderance of the evidence that they have acted in good faith and with due regard to the Moreaus' interests.

4. *Interference with Business Relations and Contract Rights*

The Moreaus claim that the Oppenheims have wrongfully induced or otherwise caused potential business customers of the Moreaus not to do business with them.

To establish a claim for wrongful interference with business relations and contract rights the Moreaus must prove by a preponderance of the evidence each of the following elements:

1. That there was a reasonable probability that the Moreaus would have entered into business or contractual relationships;
2. That the Oppenheims intentionally and knowingly prevented any such relationships from occurring with the purpose of harming the Moreaus; and

3. That actual harm or damage occurred as a result.

In connection with these elements, you are instructed that "intentionally" means that a person acted voluntarily and intended the consequences of his act, and "knowingly" means that a person acted voluntarily and purposely, not because of a mistake or accident, and that he knew the facts and circumstances which existed at the time he acted.

If you find that the Moreaus have proved each element of interference with business relations and contract rights, then you should find for the Moreaus on this claim. If you find that the Moreaus have failed to establish any one or more of the essential elements, then you must find for the Oppenheims on this claim.

5. *Conversion*

The Moreaus contend that the Oppenheims unlawfully converted their horses and luggage on November 24, 1979.

Conversion is the unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another, to the exclusion of or inconsistent with the owner's rights. To constitute conversion, there must be an intent on the part of the defendant to assert some right in the property.

The essential elements of conversion are:

1. An exercise of dominion and control over the personal property of another without that person's consent,
2. with the intent to assert some right in the property,
3. causing a deprivation of or loss of the use of the property.

You will find for the Moreaus on this claim if you find that they have proved each of the elements of conversion by a preponderance of the evidence. If you find that they have failed to prove any one or more of the elements of converison by a preponderance of the evidence, you must find for the Oppenheims on this claim.

The Claims of the Oppenheims
and
The Claim of Alduro-Raynes Arabians, Inc.

1. *Fraud*

The Oppenheims contend that the following representations made by the Moreaus constitute fraud:

1. That they (the Moreaus) would purchase a fifty percent ownership in the corporation, and
2. That they (the Moreaus) would convey title to the corporation of the horses exported to this country.

In order for the Oppenheims to be entitled to recover their damages from the Moreaus because of fraud, the Oppenheims must prove the following essential elements of fraud by a preponderance of the evidence:

1. That the Moreaus made a material representation of fact. A representation is material if the transaction would not have been entered into had the representation not been made.
2. That the representation was false.
3. That when the representation was made, the Moreaus knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion.

4. That the representation was made by the Moreaus with the intention that it be acted upon by the Oppenheims.
5. That the Oppenheims acted in reliance upon the representation and thereby suffered injury.

If you find that the Oppenheims have established each of these elements of fraud by a preponderance of the evidence, you will find for the Oppenheims on this claim. If, on the other hand, you find that the Oppenheims have failed to prove any one or more of the elements of fraud, you must find for the Moreaus on this claim.

2. *Breach of Contract*

The Oppenheims and Alduro-Raynes Arabians, Inc., contend that the Moreaus breached their contractual duty under the Memorandum of Understanding by failing to convey title to the horses to the corporation, Alduro-Raynes Arabians, Inc. In order for you to find that there has been a breach of contract by the Moreaus, you must find that the Oppenheims or Alduro-Raynes Arabians, Inc., have proved by a preponderance of the evidence that the Moreaus actually agreed to convey title to their horses to the corporation as written in the Memorandum of Understanding. The Moreaus deny that there was such an agreement and say that the language having to do with the transfer of title was inserted in the Memorandum of Understanding solely for the purpose of aiding in their immigration and in the importation of the horses into the United States.

DAMAGES

In considering the issue of damages, for either the Moreaus or the Oppenheims or both, you are instructed

that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the particular party's damages, no more and no less. Damages must not be based on speculation because it is only actual damages—what the law calls compensatory damages—that are recoverable.

As to each separate claim that has been asserted, the Moreaus and the Oppenheims claim that the acts of each other were done willfully, intentionally or with callous and reckless indifference to each other's rights so as to entitle them to an award of punitive damages in addition to compensatory damages.

If you find in favor of a party on a particular claim and if you further find that the party against whom you have found on that claim acted with malice, willfullness or callous and reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against such party as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against any party, you may consider the financial resources of such party in fixing the amount of punitive damages.

CONCLUDING INSTRUCTIONS

Keeping in mind each and every one of the instructions and definitions contained in this charge and applying each of them to the facts of this case as you find the facts to be, you will answer the questions on the special verdict form. The answer to all these questions must be based upon a preponderance of the evidence.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesman here in Court. A form of special verdict has been prepared, which you will take, along with this charge, to the jury room with you. The answer to each question on the special verdict form must be the unanimous answer of the Jury. Your foreperson will write the unanimous answer of the Jury in the space provided under each question. When it is completed, the foreperson will date and sign the special verdict form and the Jury will then return with it to the courtroom.

SIGNED and ENTERED this _____ day of March 1981.

GEORGE E. CIRE
United States District Judge

D-16

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-79-2421

JACQUES MOREAU, ERMINE MOREAU-SIPIERE, XAVIER MOREAU-SIPIERE, and ERIC MOREAU-SIPIERE,
Plaintiffs,
v.
EGON OPPENHEIM and NELLY OPPENHEIM,
Defendants.

and

CIVIL ACTION NO. H-79-2443

ALDURO-RAYNES ARABIANS, INC.,
Plaintiffs,
v.
JACQUES MOREAU, ET UX, ERMINE MOREAU, XAVIER MOREAU, and ERIC MOREAU,
Defendants.

SPECIAL VERDICT FORM

1a. With regard to the Moreaus' claim for fraud against the Oppenheims, how do you find?

Answer either "For the Moreaus" or "For the Oppenheims."

ANSWER: _____

If you have answered question 1a "for the Moreaus," answer question 1b.

1b. Do you find that the Oppenheims' actions were done willfully, intentionally or with callous and reckless indifference to the rights of the Moreaus?

Answer "We do" or "We do not."

ANSWER: _____

2a. With regard to the Moreaus' claim for conspiracy against the Oppenheims, how do you find?

Answer either "For the Moreaus" or "For the Oppenheims."

ANSWER: _____

If you have answered question 2a "for the Moreaus," answer question 2b.

2b. Do you find that the Oppenheims' actions were done willfully, intentionally or with callous and reckless indifference to the rights of the Moreaus?

Answer "We do" or "We do not."

ANSWER: _____

3a. With regard to the Moreaus' claim for breach of fiduciary duty against the Oppenheims, how do you find?

Answer either "For the Moreaus" or "For the Oppenheims."

ANSWER: _____

If you have answered question 3a "for the Moreaus," answer question 3b.

3b. Do you find that the Oppenheims' actions were done willfully, intentionally or with callous and reckless indifference to the rights of the Moreaus?

Answer "We do" or "We do not."

ANSWER: _____

4a. With regard to the Moreaus' claim for interference with business relations and contract rights against the Oppenheims, how do you find?

Answer either "For the Moreaus" or "For the Oppenheims."

ANSWER: _____

If you have answered question 4a "for the Moreaus," answer question 4b.

4b. Do you find that the Oppenheims' actions were done willfully, intentionally or with callous and reckless indifference to the rights of the Moreaus?

Answer "We do" or "We do not."

ANSWER: _____

5a. With regard to the Moreaus' claim for conversion against the Oppenheims, how do you find?

Answer either "For the Moreaus" or "For the Oppenheims."

ANSWER: _____

If you have answered question 5a "for the Moreaus," answer question 5b.

5b. Do you find that the Oppenheims' actions were done willfully, intentionally or with callous and reckless indifference to the rights of the Moreaus?

Answer "We do" or "We do not."

ANSWER: _____

6a. With regard to the Oppenheims' claim for fraud against the Moreaus, how do you find?

Answer either "For the Oppenheims" or "For the Moreaus."

ANSWER: _____

If you have answered question 6a "For the Oppenheims," answer question 6b.

6b. Do you find that the Moreaus' actions were done willfully, intentionally or with callous and reckless indifference to the rights of the Oppenheims?

Answer "We do" or "We do not."

ANSWER: _____

7. With regard to the claim of the Oppenheims and Alduro-Raynes Arabians, Inc., for breach of contract against the Moreaus, how do you find?

Answer either "For the Oppenheims and the Corporation" or "For the Moreaus."

ANSWER: _____

If you have answered "For the Moreaus" to any of questions 1a, 2a, 3a, 4a, or 5a, then answer question 8.

8. What do you find from a preponderance of the evidence to be the amount of damages caused to the Moreaus by the Oppenheims.

In arriving at your answer to the foregoing question, you may consider only such loss of income as was sustained by the Moreaus as a result of their inability to register, breed, and sell their horses in the United States during the period from November 24, 1979, until the present time.

Answer in dollars and cents, if any.

ANSWER: _____

If you have answered "We do" to any of questions 1b, 2b, 3b, 4b, or 5b, then answer question 9.

9. What amount of money do you assess against the Oppenheims as punitive damages. Answer in dollars and cents, if any.

ANSWER: _____

If you have answered either question 6a "For the Oppenheims" or question 7 "For the Oppenheims and the Corporation," answer question 10.

10. What do you find from a preponderance of the evidence to be the amount of damages caused to the Oppenheims by the Moreaus?

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-79-2421

JACQUES MOREAU-SIPIERE, ET AL.,
Plaintiffs/Appellees,

vs.

EGON OPPENHEIM, ET AL.,
Defendants/Appellants.

ORDER

The matter of the request of Plaintiffs/Appellees, Jacques Moreau, et al., for an injunction against the Defendants/Appellants, Egon Oppenheim, et al., has been referred to this Court by Order of the United States Court of Appeals for the Fifth Circuit. The parties will be referred to herein as "the Moreaus" and "the Oppenheims."

The Moreaus seek to enjoin the Oppenheims from attempting to prevent the Moreaus from registering their horses with the Arabian Horse Registry of America, Inc., and from seeking the Moreaus' deportation. In light of the jury verdict received and the Final Judgment entered herein, the Court finds that the Moreaus are entitled to the requested injunctive relief in order to protect them from further economic loss and harm pending the final

disposition of this matter before the Court of Appeals and that such relief is required in aid of this Court's judgment.

Counsel for the Moreaus has advised the Court that the Moreaus have withdrawn their request for injunctive relief against the District Director of the U.S. Immigration and Naturalization Service.

It is accordingly ORDERED that Egon Oppenheim and Nelly Oppenheim, their agents, attorneys, and employees, be, and they are hereby, ENJOINED from attempting to prevent the Moreaus from registering their horses with the Arabian Horse Registry of America, Inc., and they are further ENJOINED from attempting to initiate or facilitate deportation proceedings against the Moreaus or from interfering in any manner with the affairs of the Immigration and Naturalization Service as they relate to the Moreaus.

The Moreaus shall file a surety bond with the U. S. District Clerk in the amount of $500.00.

SIGNED and ENTERED this 17th day of June 1981.

/s/ GEORGE E. CIRE
George E. Cire
United States District Judge

APPENDIX F

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in the actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14—*Citizenship; privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

BUSINESS CORPORATION ACT

Art. 12, § 6. *Consideration for stocks or bonds; fictitious increase*

Sec. 6 No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void.

Art. 2.25. *Notice of Shareholders' Meetings*

A. Written or printed notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten (10) nor more than fifty (50) days before the date of the meeting, either personally or by mail, by or at the direction of the president, the secretary, or the officer or person calling the meeting, to each shareholder of record entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the shareholder at his address as it appears on the stock transfer books of the corporation, with postage thereon prepaid.

Art. 2.27. *Voting List*

A. The officer or agent having charge of the stock transfer books for shares of a corporation shall make, at least ten (10) days before each meeting of shareholders, a complete list of the shareholders entitled to vote at such meeting or any adjournment thereof, arranged in alphabetical order, with the address of and the number of shares held by each, which list, for a period of ten (10) days prior to such meeting, shall be kept on file at the

registered office of the corporation and shall be subject to inspection by any shareholder at any time during usual business hours. Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting. The original stock transfer books shall be prima facie evidence as to who are the shareholders entitled to examine such list or transfer books or to vote at any meeting of shareholders.

B. Failure to comply with the requirements of this Article shall not affect the validity of any action taken at such meeting.

C. An officer or agent having charge of the stock transfer books who shall fail to prepare the list of shareholders or keep the same on file for a period of ten (10) days, or produce and keep it open for inspection at the meeting, as provided in this Article, shall be liable to any shareholders suffering damage on account of such failure, to the extent of such damage. In the event that such officer or agent does not receive notice of a meeting of shareholders sufficiently in advance of the date of such meeting reasonably to enable him to comply with the duties prescribed by this Article, the corporation but not such officer or agent, shall be liable to any shareholder suffering damage on account of such failure, to the extent of such damage.

Art. 5502. [5664] [3319] *Livery stables, etc.*

Proprietors of livery or public stables shall have a special lien on all animals placed with them for feed, care and attention, as also upon such carriages, buggies or other vehicles as may have been placed in their care, for

the amount of the charges against the same; and this article shall apply to and include owners or lessees of pastures, who shall have a similar lien on all animals placed with them for pasturage.

RULES OF CIVIL PROCEDURE

Rule 8. *General Rules of Pleading*

(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Rule 12.

(e) *Motion for More Definite Statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

Rule 19. *Joinder of Persons Needed for Just Adjudication*

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;

third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as prescribed in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23.

Rule 51. *Instructions to Jury: Objection*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

UNITED STATES STATUTES

Title 8 U.S.C. § 1101.

(a)(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

(L) an alien who, immediately preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him; or

Title 8 U.S.C. § 1182. Excludable aliens—General classes

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform

such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a) (27) (A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a) (3) and 1153(a) (6) of this title, and to nonpreference immigrant aliens described in section 1153(a) (8) of this title;

Title 8 U.S.C. § 1184. Admission of nonimmigrants—Regulations

(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

Title 8 U.S.C. § 1325. Entry of alien at improper time or place; misrepresentation and concealment of facts

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by im-

migration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000, or both.

Title 18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 18 U.S.C. § 1546. Fraud and misuse of visas, permits, and other entry documents

Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United

States, or utters, uses, atempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28,

United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

As amended Oct. 18, 1976, Pub.L. 94-550, § 5, 90 Stat. 2535.

Title 28 U.S.C. § 1254.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title 28 U.S.C. § 1332. *Diversity of citizenship; amount in controversy; costs*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(2) citizens of a State and citizens or subjects of a foreign state;

Title 28 U.S.C. § 1746. *Unsworn declarations under penalty of perjury.*

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant

to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

Title 42 U.S.C.A. § 1981. *Equal rights under the law*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-2159 and 81-2279

JACQUES MOREAU, ET AL,
Plaintiffs-Appellees

v.

EGON OPPENHEIM, ET AL,
Defendants-Appellants

v.

VIRGINIA H. ZIMMERMAN,
Intervenor-Appellee
and
ALDURO-RAYNES ARABIANS, INC.,
Plaintiff-Appellant

v.

JACQUES MOREAU, ET AL,
Defendants-Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Egon Oppenheim, Nelly Oppenheim and Alduro-Raynes Arabians, Inc., the Appellants in the above styled cause, hereby appeal to the Supreme Court from the United States Court of Appeals for the Fifth Circuit judgment thereafter entered on December 2, 1981, (rehearings denied on January 25, 1982) affirming the judgment of the United States Dis-

trict Court for the Southern District of Texas dated March 23, 1981.

Respectfully submitted,

/s/ LEONARD THOMAS BRADT
Leonard Thomas Bradt
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Nelly Oppenheim and
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(713) 821-8819

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-2159 and 81-2277

JACQUES MOREAU, ET AL,
Plaintiffs-Appellees

v.

EGON OPPENHEIM, ET AL,
Defendants-Appellants

v.

VIRGINIA H. ZIMMERMAN,
Intervenor-Appellee

and

ALDURO-RAYNES ARABIANS, INC.,
Plaintiff-Appellant

v.

JACQUES MOREAU, ET AL,
Defendants-Appellees

FIRST AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Egon Oppenheim, Nelly Oppenheim and Alduro-Raynes Arabians, Inc., the Appellants in the above styled cause, hereby appeal to the Supreme Court from the United States Court of Appeals for the Fifth Circuit judgment thereafter entered on December 2, 1981, (rehearings denied on January 25, 1982) affirming the judgment of the United States District Court for the Southern District of Texas dated March 23, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1254(1).

Respectfully submitted,

/s/ LEONARD THOMAS BRADT
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